IN THE

Supreme Court of the United States

October Term, 1977

Supreme Court, U. S.
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No. 77-240

ST. PAUL FIRE & MARINE INSURANCE CO., AETNA CASUALTY & SURETY CO., TRAVELERS INDEMNITY OF RHODE ISLAND, TRAVELERS INDEMNITY CO. OF RHODE ISLAND, TRAVELERS INSURANCE CO., HARTFORD CASUALTY COMPANY and HARTFORD FIRE INSURANCE CO.,

Petitioners,

v.

DAVID M. BARRY, M.D., LEROY S. CHAPNICK, M.D., WALTER C. COTTER, M.D., PAUL J. M. HEALEY, M.D., ANTHONY F. MERLINO, M.D., PAUL B. METCALF, M.D., H. GERALD ROCK, M.D., and ROSARIO V. TOMASELLI, M.D.,

and

PENNY ANDREW, CONSTANCE V. BOISSE, CHRISTOPHER DANIELS, ARTHUR H. FERLAND, GLADYS L. SPAIGHT, and ALPHONSE D. VITULLO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SIDNEY S. ROSDEITCHER
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10022

THOMAS D. GIDLEY
STEPHEN J. CARLOTTI
HINCKLEY, ALLEN,
SALISBURY & PARSONS
2200 Industrial Bank Building
Providence, Rhode Island 02903

Attorneys for
The Aetna Casualty and Surety Co.

WALKER B. COMEGYS
POWERS & HALL
30 Federal Street
Boston, Massachusetts 02110

KIRK HANSON
HANSON, CURRAN, BOWEN & PARKS
1210 Turks Head Building
Providence, Rhode Island 02903

Attorneys for
St. Paul Fire & Marine
Insurance Company

CHARLES LISTER
COVINGTON & BURLING
888 16th Street, N. W.
Washington, D. C. 20006

JOSEPH A. KELLY
CARROLL, KELLY & MURPHY
326 Industrial Bank Building
Providence, Rhode Island 02903

Attorneys for
Hartford Casualty Company and
Hartford Fire Insurance Co.

JOSEPH V. CAVANAGH
HIGGINS, CAVANAGH & COONEY
600 Turks Head Building
Providence, Rhode Island 02903

Attorneys for
Travelers Insurance Company

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners St. Paul Fire & Marine Insurance Company, The Aetna Casualty and Surety Co., Hartford Casualty Company, Hartford Fire Insurance Company and Travelers Insurance Company ask that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on May 16, 1977.

Opinions Below

The majority and dissenting opinions of the Court of Appeals for the First Circuit, officially reported at 555 F.2d 3, are annexed to this petition as Appendix A. (A. 1a.)* The opinion of the United States District Court for the District of Rhode Island, which dismissed plaintiffs' antitrust claim, is not officially reported, but is annexed as Appendix B.** (A. 26a.)

Jurisdiction

The Court of Appeals entered judgment on May 16, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). A judgment of the District Court dismissing the Amended Complaint was entered on December 1, 1975, and a final judgment dismissing the Second Amended Complaint was entered on April 1, 1976. Jurisdiction in the District Court was asserted under 15 U.S.C. §§15 and 26, and 28 U.S.C. §§1331 and 1337.

Questions Presented

The McCarran-Ferguson Act expressly renders the Sherman Act inapplicable to the business of insurance to the extent regulated by the states, except in cases involving "boycott, coercion or intimidation." Here, the First Circuit adopted an interpretation of the boycott exception which, in the words of the dissenting opinion, would "reintroduce through the back door most of the Sherman Act" (A. 24a), and which the majority opinion acknowledged to be in direct conflict with a "formidable array of authorities." (A. 6a.)

* Citations refer to the Appendix found at the conclusion of this Petition.

** In a second opinion, entered on March 19, 1976, the District Court dismissed plaintiffs' state law claims. That opinion was affirmed by the Court of Appeals for the First Circuit and is not a subject of this petition.

In a 2 to 1 decision, the First Circuit rejected the then unanimous view that the boycott exception did not encompass claims by policyholders based upon alleged conspiracies among insurance companies relating to the terms of their insurance contracts. The First Circuit held that policyholders could overcome the McCarran-Ferguson antitrust exemption and bring their claims within the boycott exception by simply pleading them as a concerted refusal to sell policyholders the type of coverage they wanted.

All other courts which have considered the issue have reasoned that such a reading would bring virtually every Sherman Act conspiracy claim concerning the terms of insurance policies within the boycott exception. This, they concluded, would nullify the McCarran-Ferguson antitrust exemption and undermine this Court's stated view that the Act was primarily designed "to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 459 (1969). Hence, these courts limited the exception to the boycotts and blacklists of other insurance companies and agents which were Congress' main concern at the time it enacted the exception, or to similar conduct involving concerted action

to coerce other traders to adhere to the terms of the conspiracy.

As the dissent points out, the novel First Circuit reinterpretation of the boycott exception "introduces a new category of federal antitrust suit" which "could have unforeseeable effects upon state regulatory policies." (A. 25a.) It would enable policyholders to convert grievances concerning the terms of their insurance policies into federal antitrust claims and, for the first time since the enactment of the McCarran-Ferguson exemption more than 30 years ago, it would thrust upon the federal courts a consumer protection role heretofore exercised exclusively by state insurance departments.

This petition thus presents the following questions for review:

1. Should the First Circuit's novel and broad interpretation of the boycott exception to the McCarran-Ferguson Act antitrust exemption be allowed to prevail in the face of its admitted conflict with "a formidable array of authorities," including at least two different but narrower constructions of the boycott exception adopted by four other circuit courts of appeals?

2. Did the First Circuit erroneously permit the boycott exception to the McCarran-Ferguson Act antitrust exemption to be invoked by policyholders who simply pleaded an alleged conspiracy by insurance companies to limit the type of coverage available as a concerted refusal to sell policyholders the coverage they want?

3. By greatly expanding federal jurisdiction to hear complaints by policyholders concerning the terms of their insurance, does the First Circuit's interpretation of the boycott exception conflict with *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 459-60 (1969), which found that the purpose of the McCarran-Ferguson Act was to leave to state regulation matters involving "the relationship between the insurance company and the policyholder"?

4. Was the First Circuit's novel and broad interpretation of the boycott exception to the McCarran-Ferguson Act antitrust exemption warranted in light of the meaning commonly given to the term "boycott" by this Court in cases arising under the Sherman Act?

Statutes Involved

Section 1 of the Sherman Act, 15 U.S.C. §1 (Supp. V, 1975):

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

Section 1 of the McCarran-Ferguson Act, 15 U.S.C. §1011 (1970):

> "Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

Section 2 of the McCarran-Ferguson Act, 15 U.S.C. §1012 (1970):

> "(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate the the regulation or taxation of such business.
>
> "(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the . . . Sherman Act, and the . . . Clayton Act, and . . . the Federal Trade Commision Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

Section 3(b) of the McCarran-Ferguson Act, 15 U.S.C. §1013(b) (1970):

> "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

Statement of the Case

1. The Antitrust Allegations

Plaintiffs purport to represent a class of Rhode Island physicians and a class of their present or prospective patients. The first count of their amended complaint (Appendix C, A. 38a)* was brought under the Sherman Act and alleged a conspiracy among St. Paul, by whom the plaintiff physicians had been insured for malpractice, and Aetna, Hartford and Travelers.

According to the complaint, in April, 1975, St. Paul announced that it would not renew medical malpractice coverage on an "occurrence" basis and would issue new coverage only on a "claims made" basis.** Plaintiffs allege that thereafter Aetna, Hartford and Travelers refused to issue any malpractice coverage to physicians previously covered by St. Paul, as part of a collective refusal by the insurance companies to sell medical malpractice coverage on an "occurrence" basis to physicians insured by St. Paul. (A. 46a-48a.)

The complaint also describes the alleged conspiracy as an agreement not to compete, price-fixing and unfair discrimination between insureds, and contains the customary

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* Plaintiffs' first amended complaint is set forth in its entirety in Appendix C. A subsequently dismissed second amended complaint, setting forth plaintiffs' state law claims, is not a subject of this petition and is not annexed.

** An "occurrence" basis policy covers claims arising out of acts occurring during the term of the policy even when the claim is made after the policy expires. "Claims made" policies cover only claims actually asserted while the policy is in force, thus precluding liability for potential claims after the policy expires.

recitation in cases of this kind, that such conduct amounted to boycott, coercion and intimidation. (A. 48a.)

Plaintiffs seek damages and equitable relief, including an injunction prohibiting the insurance companies from denying plaintiffs "medical malpractice insurance on an 'occurrence basis' at reasonable rates. . . ." (A. 51a.)

2. The Decisions Below

The District Court granted a motion to dismiss these antitrust allegations, holding that they were barred by the McCarran-Ferguson exemption. There was no dispute that the conduct alleged related to the "business of insurance". Nor was there any question that the conduct was regulated by Rhode Island. Aside from a comprehensive code regulating all phases of the insurance business, including anti-competitive and unfair practices, Rhode Island was then trying to remedy problems in the cost and availability of medical malpractice insurance through special emergency regulation. Commencement of this suit virtually coincided with the formation by Rhode Island of a Joint Underwriting Association ("JUA"), which took over the business of writing medical malpractice coverage in Rhode Island with full authority to establish terms and rates for such coverage.*

* The JUA was created by Emergency Regulation XXI, R.I. Dep't of Business Regulation, Insurance Division, June 16, 1975, and received express legislative sanction in R.I. Gen. Laws §42-14.1-1. Rhode Island's comprehensive regulation of the business of insurance in general is illustrated by R.I. Gen. Laws §§27-9-4, 27-9-7, 27-9-15, 27-9-16, 27-9-18, and 27-9-19, setting forth requirements and procedures for state approval of the terms of insurance policies, and by R.I. Gen. Laws §§27-29-1 *et seq.*, broadly prohibiting "unfair competition and practices" in the "business of insurance."

Plaintiffs argued, however, that the McCarran-Ferguson exemption did not preclude them from seeking simultaneous relief in the federal courts because, they contended, the conduct alleged came within the boycott exception. The District Court rejected this argument, relying on the Fifth Circuit's decision in *Meicler* v. *Aetna Casualty & Surety Co.*, 506 F.2d 732 (5th Cir. 1975), and the Ninth Circuit's decision in *Addrisi* v. *Equitable Life Assurance Society of the United States*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975). The District Court adopted the reasoning of these Courts of Appeals that to read the exception to encompass policy holder claims "would be contrary to the legislative history of the Act," would "emasculate" the Act, and " 'would vitiate the McCarran-Ferguson Act in its concept of setting over unto the several states the regulation, and protection of the insurer-insured relationship.' " (A. 32a.) By the time the appeal from the District Court reached the First Circuit, at least six additional District Courts had adopted the Fifth and Ninth Circuit construction of the boycott exception.

The First Circuit concluded that it was "compelled to disagree with this rather formidable array of authorities." (A. 6a.) Over the dissent of Judge Campbell, the majority concluded that, notwithstanding these decisions, the boycott exception must be read to encompass claims by policyholders that insurance companies engaged in a concerted refusal to sell them the type of policies they desired.

The majority believed that the prior decisions were in error for two reasons: First, the Court concluded that the earlier decisions erroneously went behind the words

of the boycott exception and relied upon its legislative history. In the majority's view, the "plain meaning" of the phrase "boycott, coercion and intimitation" encompassed claims by policyholders that insurance companies collectively refused to sell them the insurance they wanted. The majority rejected the view that such a reading of the exception would nullify the McCarran-Ferguson exemption from the Sherman Act. Yet the majority appeared to acknowledge that under its reading the only claims that would continue to be exempt from the Sherman Act were acts of individual monopolists, such as predatory pricing and the use of "benign" means to maintain a monopoly. (A. 9a.)

Second, the majority concluded that the prior decisions had misread the legislative history of the boycott exception when they found that Congress was solely concerned with a system of industry self-government, which enforced its regulations of those engaged in the insurance business through boycotts and blacklists of nonconforming insurance companies and agents. While conceding that the legislative history made no mention of boycotts, coercion or intimidation aimed at consumers, and that the history disclosed that "the vice of insurance company self-government outside the law obviously lay in [the legislators'] minds as a major evil," the majority concluded that "there is no suggestion that the legislation was limited to that evil." (A. 17a.)

Judge Campbell entered a vigorous dissent. In his view, the majority's interpretation of the exception ren-

dered virtually meaningless the McCarran-Ferguson exemption from the Sherman Act:

> "[U]nder the clear implication of §1012, neither the Sherman Act nor the other antitrust laws apply except insofar as the §1013(b) exception permits. That exception provides, 'Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.' Significantly this language does not track the broad 'contract, combination . . . or conspiracy' language of the Sherman Act which Congress reasonably might have chosen had the intent been, as my brothers state, to encompass in the exception virtually all activities in violation of the Sherman Act involving more than an individual monopolist.
>
> ". . . Indeed to read §1013(b) expansively is to hold that what Congress gave with one hand it took with the other, since while my brothers' reading does not introduce the entirety of federal antitrust law into the business of insurance, it introduces a very major part thereof and does so with no clear explanation of why Congress should first take pains to eliminate the antitrust laws and then reintroduce by the back door most of the Sherman Act." (A. 22a-24a.)

Moreover, Judge Campbell viewed the majority decision as subversive of the main objective of the McCarran-Ferguson Act:

> "The central thread running through the McCarran-Ferguson Act is that regulation of insurance rates and policies—both of them matters falling under the general heading of relations between companies and policy holders—is left to the states. The present

litigation brought by physicians who believe that they have been deprived, unfairly, of insurance on terms that are economically favorable focuses precisely upon company-policyholder matters. My brothers are now putting the federal courts in the same arena as the State of Rhode Island, contrary, I believe, to the purpose of the McCarran-Ferguson Act. Doubtless the federal perspective is somewhat different but the potential for conflict between state regulation and federal antitrust policies is real and the decision has the effect of substantially undercutting §1012(b) of the Act." (A. 24a-25a.)

Finally, Judge Campbell's dissent noted with concern the radical change which the majority's novel interpretation effected in the role of the federal courts and in its potential impact on state regulation of insurance:

"This is, I think, a most unfortunate decision. It not only introduces a new category of federal antitrust suit which will be very difficult to manage at a time when federal courts are strained to the limit, but it could have unforseeable effects upon state regulatory policies. Plaintiffs may see this case as another string to their bow in attempting to deal with the crushing malpractice burdens being imposed as the result not only, perhaps, of predatory insurance practices but of inflated claims and verdicts. We might sympathize with them without going this far. The State of Rhode Island has apparently now enacted regulatory legislation dealing with some or all of the problem—a means of redress which seems far more responsive to the problem than any likely to be achieved through reinterpreting the McCarran-Ferguson Act thirty years after enactment." (A. 25a.)

Reasons for Allowance of the Writ

We believe certiorari is warranted not only because the First Circuit's interpretation of the boycott exception creates a conflict with other circuits. Review is needed because the First Circuit's interpretation seriously undermines the McCarran-Ferguson exemption from the Sherman Act, subverts the purposes attributed to the McCarran-Ferguson Act in *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969), and radically alters federal-state relations in the regulation of the policyholder-insurance company relationship by opening the federal courts to a new type of consumer protection suit in an area previously considered within the exclusive jurisdiction of the states. In this very case, the continuation of this lawsuit would bring the federal court into a controversy which the State of Rhode Island has already addressed through emergency regulatory measures. As Judge Campbell noted, "the potential for conflict between state regulation and federal antitrust policies is real. . . ." (A. 25a.) Review by this Court is needed to effectuate the McCarran-Ferguson Act's policy of preventing such conflicts.

I. An authoritative resolution by this Court is required to resolve a three-way conflict dividing the various circuits on the meaning of the boycott exception to the McCarran-Ferguson Act.

The First Circuit acknowledged that it was in conflict with a "formidable array of authorities." Indeed, the conflict has now been expanded, since a recent decision by the Court of Appeals for the District of Columbia Circuit has adopted yet a third interpretation of the exception

which also conflicts with the First Circuit's. The construction of the boycott exception has been a frequent source of litigation in the last few years—since 1974, there have been at least 10 federal court decisions in which the meaning of the exception was in issue—and it is, at this moment, a central issue in numerous cases pending in the federal district and appellate courts.* An authoritative resolution of the conflict is thus urgently needed.

Meicler v. *Aetna Casualty & Surety Co.*, 506 F.2d 732 (5th Cir. 1975), *aff'g* 372 F. Supp. 509 (S.D. Tex. 1974), which involved facts very similar to those involved here, is representative of the view adopted by a majority of courts which have considered the scope of the boycott exception.

In *Meicler*, plaintiffs complained that the insurance company with which they had been doing business refused to renew an automobile liability policy on terms which they thought reasonable, and that all other insurers within the state conspired with that company to refuse to sell policies to them on their former, more advantageous terms. The allegations were thus a precise analogue to those presented here. In an effort to bring their claim within the boycott exception, plaintiffs framed their allegations in terms of

* We are aware of the following pending cases in which the construction of the exception for boycotts, coercion or intimidation is in issue: *Royal Drug Co.* v. *Group Life and Health Insurance Co.*, 415 F. Supp. 343 (W.D. Texas 1976), *appeal docketed*, No. 76-2746 (5th Cir. June 24, 1976); *Goldman* v. *Aetna Life Insurance Co.*, No. CA-4-77-154 (N.D. Texas, filed June 6, 1977); *Bartholomew* v. *Virginia Chiropractors Association*, No. 77-0062-R (W.D. Va., filed April 7, 1977); *Manhattan Life Insurance Co.* v. *Prudential Insurance Co. of America*, No. 70-837-G (D. Mass., filed June 30, 1970). In addition, another petition for certiorari (No. 77-171), filed with this Court on July 29, 1977, seeks review of the interpretation of the boycott exception adopted by the Third Circuit in *Frankford Hospital* v. *Blue Cross*, 554 F.2d 1253 (3d Cir. 1977), *aff'g* 417 F.Supp. 1104 (E.D. Pa. 1976).

a collective refusal to deal, except on terms which the insurance companies dictated. The District Court rejected the attempt. In its view, the legislative history of the boycott exception revealed that Congress was primarily seeking to deal with conspiracies among insurance companies to boycott or refuse to deal with other insurance companies and agents. It found nothing to suggest that the boycott exception was intended to apply to "a refusal by insurance companies to deal with particular segments of the public except under fixed classifications and premium rates." 372 F. Supp. at 513-14.

On appeal, the Fifth Circuit unanimously affirmed, stating that:

> "[plaintiffs'] broad construction of Section 1013(b) would emasculate the antitrust exemption contained in Section 1012(b) of the McCarran-Ferguson Act. We affirm the district court's holding that the boycott exception does not apply." 506 F.2d at 734.

The Fifth Circuit view has also been adopted by the Ninth Circuit in *Addrisi* v. *Equitable Life Assurance Society of the United States*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1974), and it now appears that the Third Circuit implicitly adopted this construction in its *per curiam* affirmance in *Frankford Hospital* v. *Blue Cross*, 417 F.Supp. 1104 (E.D. Pa. 1976), *aff'd*, 554 F.2d 1253 (3d Cir. 1977), *petition for cert. filed*, No. 77-171 (U.S. July 29, 1977). Nine District Court decisions have adopted the same construction.*

* *Pierucci* v. *Continental Casualty Co.*, 418 F. Supp. 704 (W.D. Pa. 1976) (involving an attack on "claims made" policies similar to the one involved here); *State of Ohio* v. *Ohio Medical Indemnity*,

(footnote continued on next page)

Recently, the Court of Appeals for the District of Columbia adopted yet another narrower construction of the boycott exception in *Proctor* v. *State Farm Mutual Automobile Insurance Co.*, 1977-1 Trade Cases (CCH) ¶61,481 (D.C. Cir. 1977). *Proctor* did not involve a suit by a policyholder, but by tradesmen in the auto repair business who claimed that insurance companies conspired with other auto repairmen to limit payments for auto repairs under automobile insurance contracts. Plaintiffs claimed that the effect of this conspiracy was to limit the prices they could charge for auto repairs. A principal issue in *Proctor* was whether the auto repairmen's claim that the conspiracy involved a collective refusal to deal except at fixed terms fell within the boycott exception.

The Court of Appeals was unwilling to accept the Fifth and Ninth Circuit view that the boycott exception was limited to boycotts of other insurance companies and their agents. However, unlike the First Circuit here, the District of Columbia Circuit "recognize[d] that the terms of the [boycott] provision are not self-defining, and are capable of being read in such a way as to swallow the anti-trust ex-

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Inc., 1976-2 Trade Cases (CCH) ¶61,128 (S.D. Ohio 1976); *Mathis* v. *Automobile Club Inter-Insurance Exchange*, 410 F. Supp. 1037 (W.D. Mo. 1976); *Royal Drug Co.* v. *Group Life and Health Insurance Co.*, 415 F. Supp. 343 (W.D. Tex. 1976), *appeal docketed*, No. 76-2746 (5th Cir. June 24, 1976); *Pastor* v. *Hartford Fire Insurance Co.*, 1976-1 Trade Cases (CCH) ¶60,783 (C.D. Cal. 1976), *appeal docketed*, No. 77-1243 (9th Cir. January 26, 1977); *McIlhenny* v. *American Title Insurance Co.*, 418 F. Supp. 364 (E.D. Pa. 1976); *Seasongood* v. *K&K Insurance Agency*, 414 F. Supp. 698 (E.D. Mo. 1976), *rev'd on other grounds*, 548 F.2d 729 (8th Cir. 1977); *Mitgang* v. *Western Title Insurance Co.*, 1974-2 CCH Trade Cases ¶75,322 (N.D. Cal. 1974); and *Transnational Insurance Company* v. *Rosenlund*, 261 F. Supp. 12 (D. Ore. 1966).

emption." (1977-1 Trade Cases (CCH) at 71,869.) It recognized, for example, that a price-fixing conspiracy could "perhaps be characterized as a collective refusal to deal except at the prevailing rates." (1977-1 Trade Cases (CCH) at 71,870.) However, it found that the boycott exception could not possibly be read so expansively because the legislative history clearly indicated that price-fixing was not considered a boycott, and that such conduct fell squarely within the McCarran-Ferguson exemption. (1977-1 Trade Cases (CCH) at 71,869.)

The Court found instead that interpreting the language of the exception in light of the legislative purpose permitted alleged conspiracies to be brought within the boycott exception only where the conspirators took distinct punitive steps to compel adherence to the terms fixed by the conspiracy, such as excluding from the market those who would not be bound by its terms.

Proctor is flatly inconsistent with the result reached by the First Circuit. Under *Proctor*, traders other than insurance companies or agents may invoke the boycott exception. But *Proctor* does not allow policyholders dissatisfied with the terms of their insurance contracts to open the doors of the federal courts simply by framing their complaint in the language of a concerted refusal to sell them the type of policies they desire.

The First Circuit's interpretation of the boycott exception—which considers such policyholder claims to be within the scope of the exception—is thus at odds not only with the majority view, but also with the more recent *Proctor*

test.* Review by this Court is urgently needed to provide definitive guidance as to the proper interpretation of the exception.

II. Review is needed to correct a misinterpretation of the boycott exception which would subvert the McCarran-Ferguson exemption and involve federal courts in a new class of consumer litigation involving controversies which Congress left to the states to resolve.

Every federal judge who has considered the issue—except the First Circuit majority—has concluded that an expansive reading of the boycott exception, to encompass claims like those involved here, would emasculate the express Sherman Act exemption conferred by Congress in the McCarran-Ferguson Act and undermine the congressional policy that regulation of the insurer-insured relationship should be left to the states. Hence, these judges

* *Proctor* suggests that the Second, Third and Fourth Circuits adopted broader definitions of the boycott exception, varying from the Fifth and Ninth Circuit tests. However, the Second Circuit case it cites—as the *Proctor* Court acknowledges—involved allegations of a boycott directed at other insurance companies. *Monarch Life Insurance Co.* v. *Loyal Protective Life Insurance Co.*, 326 F.2d 841 (2d Cir. 1963), *cert. denied*, 376 U.S. 952 (1964). The Third Circuit case, *Travelers Insurance Co.* v. *Blue Cross*, 481 F.2d 80 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973), merely held that there was no boycott of any kind. In the later *Frankford* case, the Third Circuit affirmed a decision which relied on the cases limiting the exception to boycotts directed at other insurance companies and agents. *Frankford Hospital* v. *Blue Cross*, 417 F. Supp. 1104 (E.D. Pa. 1976), *aff'd* 554 F.2d 1253 (3d Cir. 1977), *petition for cert. fued*, No. 77-171 (U.S. July 29, 1977). And the Fourth Circuit case cited by the First Circuit in support of its decision, *Ballard* v. *Blue Shield*, 543 F.2d 1075 (4th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3601 (U.S. March 8, 1977), which did allow traders other than insurance companies and agents to invoke the boycott exception, apparently did not consider the insurance company-agent limitation, which is not discussed in its opinion and was only briefly referred to in one of the six briefs on appeal.

have looked to the history and background of the Act to find a limiting construction which would harmonize the boycott exception with the broad objectives of the McCarran-Ferguson Act.

We believe this view is unquestionably correct, and that review is needed to implement the congressional policy reflected in the Act and assure that the First Circuit's interpretation does not become an invitation to policyholders to invoke a federal forum to redress grievances which until now have been left to state regulation.

A. The First Circuit's interpretation nullifies the McCarran-Ferguson Act exemption from the Sherman Act and frustrates its policy to leave to state regulation matters involving the relationship between insurance companies and policyholders.

The background and objectives of the McCarran-Ferguson exemption were explained by this Court in *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 458-60 (1969):

> "The McCarran-Ferguson Act was passed in reaction to the Court's decision in *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944). Prior to that decision, it had been assumed, in the language of the leading case, that '[i]ssuing a policy of insurance is not a transaction of commerce.' *Paul* v. *Virginia*, 8 Wall. 168, 183 (1869). Consequently, regulation of insurance transactions was thought to rest exclusively with the States. In *South-Eastern Underwriters*, this Court held that insurance transactions were subject to federal regulation under the Commerce Clause, and that the antitrust laws, in particular, were applicable to them. . . ."

". . . In context . . . it is relatively clear what problems Congress was dealing with. Under the regime of *Paul* v. *Virginia, supra,* States had a free hand in regulating the dealings between insurers and their policyholders. Their negotiations, and the contract which resulted, were not considered commerce and were, therefore, left to state regulation. The *South-Eastern Underwriters* decision threatened the continued supremacy of the States in this area. The McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation. . . ."

". . . Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which *Paul* v. *Virginia* held was not 'commerce'. The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.' "

There can be no question that the central purpose of the McCarran-Ferguson Act was to render federal law—and specifically the Sherman Act and other antitrust laws—inapplicable to matters affecting the insurer-insured relationship where those matters are regulated by state law. Indeed, so significant was this policy that Congress declared a three year moratorium on the application of the antitrust laws to give the states time to enact regulatory legislation which would have a reverse preemptive effect on federal antitrust laws. 15 U.S.C. §1012(b).

The First Circuit's interpretation stands the McCarran-Ferguson Act on its head. By reading the boycott exception as indicative of an expansive antitrust policy, rather than

looking to the policy of the Act as a whole, the First Circuit confines the express McCarran-Ferguson exemption from the Sherman Act to conduct by individual monopolists primarily aimed at excluding their competitors, and allows application of the Sherman Act to precisely that area which Congress left to the states—complaints by policyholders against insurance companies concerning the terms of their insurance coverage. Thus, the First Circuit's interpretation brings every alleged conspiracy or agreement covered by the Sherman Act within the boycott exception: Price-fixing allegations, for example, can be couched as conspiracies to refuse to sell coverage except at the agreed rate; horizontal agreements not to compete can be transformed into concerted refusals to deal with one another's customers; agreements not to engage in product competition can be framed as collective refusals to sell other than the agreed upon product. Indeed, the conduct alleged here as a concerted refusal to deal could as easily have been described under other antitrust classifications not normally thought of as boycotts: an agreement by the insurance companies to fix the type of malpractice coverage available; an agreement not to engage in product competition; or an agreement not to compete for customers. And, under an expansive reading, any alleged agreement to restrain trade which could not be described as a concerted refusal to deal could surely fit within the rubric of coercion and intimidation.

By reintroducing the full force of the Sherman Act to the area of policyholder-insurance company relations, the First Circuit's interpretation poses the very threat to state regulation which the McCarran-Ferguson Act was designed to eliminate. This case dramatizes the point.

The timing of this lawsuit coincided with the implementation of Rhode Island's regulatory efforts to deal with problems of the cost and availability of medical malpractice coverage. Plaintiffs seek a federal court decree requiring the issuance of "occurrence basis" policies at "reasonable rates." But under Rhode Island's regulatory scheme, the JUA is authorized to issue either "claims made" or "occurrence basis" policies, or both, and to fix the rates for such coverage.* Plaintiffs also seek damages based upon alleged overcharges in malpractice premiums, which would amount to a rebate from the rates approved by Rhode Island.

More important, the First Circuit's expansive interpretation of the boycott exception may encourage policyholders to use the bludgeon of onerous federal antitrust class action litigation as a device for obtaining solutions to problems heretofore left to state insurance regulatory agencies. Many antitrust class actions are commenced principally, if not entirely, in the hope of obtaining a monetary settlement or compelling agreement among the parties to a change in business practices. But private settlement of controversies involving the terms of insurance contracts issued to an entire class of policyholders, even with court approval, runs counter to a system of state regulation of the terms and rates of insurance contracts.

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* Emergency Regulation XXI §5, R.I. Dep't of Business Regulation, Insurance Division; R.I. General Laws §42-14.1-1(F).

B. The First Circuit's construction of the boycott exception should not be allowed to prevail over the narrow constructions adopted by other circuits or the common meaning of the term "boycott" as used by this Court in cases arising under the Sherman Act.

Nothing warranted the First Circuit in giving to the boycott exception a broad interpretation which so emasculates the McCarran-Ferguson exemption and subverts its policy. In applying what it believed to be the "plain meaning" of the words of the exception, the First Circuit ignored this Court's warning that "[t]he process of interpretation . . . misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve." *Markham* v. *Cabell*, 326 U.S. 404, 409 (1945). The narrower constructions given to the boycott exception by the Third, Fifth, Ninth and District of Columbia Circuits are necessary to preserve the exemption and carry out its policy.

Moreover, the "plain meaning" of the phrase "boycott, coercion or intimidation" does not encompass claims by policyholders like those involved here. Alleged agreements among sellers not to compete for one another's customers or to fix the terms on which they are willing to deal have never been classified by this Court as boycotts under the Sherman Act—and restating such agreements as concerted refusals to deal except on the terms fixed by the conspiracy cannot make them boycotts. Every boycott case decided by this Court has involved collective action to prevent a trader outside of a conspiracy from competing with one or more of the conspirators, or to force a competitor not part of a conspiracy to conform his business practices to

those which the conspiracy dictates. *E.g. United States* v. *South-Eastern Underwriters Association,* 322 U.S. 533 (1944); *United States* v. *General Motors Corp.,* 384 U.S. 127 (1966); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207, 212 (1959); *Fashion Originators' Guild of America, Inc.* v. *FTC,* 312 U.S. 457 (1941). No case has ever treated the type of concerted refusal alleged here as a boycott.

Further, this Court has recognized that "words" used in statutes "acquire scope and function from the history of events which they summarize." *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 186 (1941). The words "boycott, coercion or intimidation" appear to have been taken from *United States* v. *South-Eastern Underwriters,* where they were used to summarize collective action taken by insurance companies and agents to compel other insurance companies and agents to adhere to a system of private regulation, and to exclude from the market those who would not conform.* This Court did not refer, by that phrase, to simple agreements to fix the price of insurance sold to consumers.

The conduct described in *United States* v. *South-Eastern Underwriters* was the same conduct which Congress referred to in its discussions of the boycott exception, as even the portions of legislative debate quoted by the First Circuit majority makes plain. (A. 13a-16a.) Indeed, the

* The First Circuit understood *United States* v. *South-Eastern Underwriters* to include "boycotts" of policyholders. But this Court's reference to such practices related to refusals to deal with policyholders who dealt with non-member insurance companies, and with companies varying from the terms of the conspiracy, and was part of the overall effort to exclude non-participating companies or agents from the insurance business. *See* 322 U.S. at 535-36, 562.

boycotts and blacklists of insurance companies and agents, and the private system of self-government to enforce adherence to the industry's rules, are the only illustration found in the debates of what Congress meant by "boycott, coercion or intimidation." "[A]t no point," as the First Circuit majority recognized, "were any remarks directed to the possibility of boycotts, coercion or intimidation aimed at consumers." (A. 16a.)

The Fifth and Ninth Circuits found the legislators' concern, as expressed in the debates, sufficient to justify restriction of the boycott exception to acts against insurance companies and agents. The District of Columbia Circuit in *Proctor,* not convinced that Congress intended to limit the Act to boycotts directed at insurance companies and agents, looked to the text of *United States* v. *South-Eastern Underwriters* to ascertain the type of conduct there described by the phrase "boycott, coercion or intimidation." But like the Fifth and Ninth Circuits, the District of Columbia Circuit recognized the need for some limitation which would preclude suits, like the one involved here, in which policyholders seek to cast their grievances pertaining to the terms of their insurance contracts as a collective refusal to sell them coverage on terms they desire.

Without such a limiting principle, for which the history underlying the McCarran-Ferguson Act and this Court's use of the term "boycott" furnish ample support, no meaningful exemption would remain.

Conclusion

The First Circuit's departure from the more limited interpretations of the boycott exception, now adopted by four other circuits, expands federal jurisdiction into a realm historically left to the states, giving every policyholder a federal forum in which to air grievances previously thought the domain of state administrative, legislative and judicial processes.

Such a change in federal-state relations, involving a significant expansion of federal judicial power, and commitment of federal judicial resources, should not be permitted without review by this Court.

August, 1977

Respectfully submitted,

SIDNEY S. ROSDEITCHER
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10022

THOMAS D. GIDLEY
STEPHEN J. CARLOTTI
HINCKLEY, ALLEN,
SALISBURY & PARSONS
2200 Industrial Bank Building
Providence, Rhode Island 02903

Attorneys for
The Aetna Casualty and Surety Co.

WALKER B. COMEGYS
POWERS & HALL
30 Federal Street
Boston, Massachusetts 02110

KIRK HANSON
HANSON, CURRAN, BOWEN & PARKS
1210 Turks Head Building
Providence, Rhode Island 02903

Attorneys for
St. Paul Fire & Marine
Insurance Company

CHARLES LISTER
COVINGTON & BURLING
888 16th Street, N. W.
Washington, D. C. 20006

JOSEPH A. KELLY
CARROLL, KELLY & MURPHY
326 Industrial Bank Building
Providence, Rhode Island 02903

Attorneys for
Hartford Casualty Company and
Hartford Fire Insurance Co.

JOSEPH V. CAVANAGH
HIGGINS, CAVANAGH & COONEY
600 Turks Head Building
Providence, Rhode Island 02903

Attorneys for
Travelers Insurance Company

Appendices

Appendix A

Opinion of the United States Court of Appeals for the First Circuit

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 76-1226

DAVID M. BARRY, M.D., ET AL.,
PLAINTIFFS, APPELLANTS,

v.

ST. PAUL FIRE &
MARINE INSURANCE COMPANY, ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[HON. RAYMOND J. PETTINE, *U.S. District Judge*]

Before COFFIN, *Chief Judge*
CAMPBELL, *Circuit Judge*, and
GIGNOUX,* *District Judge*.

Leonard Decof, with whom *Mark S. Mandell* and *Leonard Decof, Ltd.* were on brief, for appellants.

Sidney S. Rosdeitcher, with whom *Paul, Weiss, Rifkind, Wharton & Garrison, Jack Hassid, Hinckley, Allen, Salisbury & Parsons, Thomas D. Gidley, Stephen J. Carlotti, Covington & Burling, Charles Lister, Jonathan M. Weisgall, Carroll, Kelly & Murphy*, and *Joseph A. Kelly* were on brief, for Aetna Casualty & Surety Co., Hartford Casualty Company and Hartford Fire Insurance Company, appellees.

Walker B. Comegys, with whom *Powers & Hall, Kirk Hanson, David P. Whitman, Hanson, Curran, Bowen & Parks, Joseph V. Cavanagh*, and *Higgins, Cavanagh & Cooney* were on brief, for St. Paul Fire & Marine Insurance Company and Travelers Insurance Company, appellees.

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* Of the District of Maine, sitting by designation.

Appendix A

May 16, 1977

COFFIN, *Chief Judge.* The primary issue presented by this appeal is whether a "consumer" of insurance can sue an insurance company for violating the antitrust laws. Under the McCarran-Ferguson Act, 15 U.S.C. §§1011-15, "the business of insurance" is exempted from antitrust regulation to the extent that it is regulated by the states. *Id.* §1012(b). But McCarran-Ferguson does not confer a blanket immunity: insurers are subject to the Sherman Act if they engage in "acts of boycott, coercion, or intimidation" or if they agree to engage in such acts. *Id.* §1013(b). We must decide whether this exception applies only to insurance company boycotts of agents and other companies or also applies to refusals to deal with policyholders.

This suit is brought by plaintiffs seeking to represent two classes: all licensed physicians practicing in the state of Rhode Island and all citizens of Rhode Island who are or will be under a doctor's care. The defendants are four insurance companies that have sold malpractice insurance to Rhode Island doctors. The plaintiffs charges in their amended complaint that these companies violated the nation's antitrust laws by conspiring to shrink the malpractice coverage available to Rhode Island doctors. According to the complaint, one company, St. Paul Fire & Marine Insurance Company, changed its future malpractice policies to provide coverage only on a "claims made" basis, rather than an "occurrence"

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basis.[1] When St. Paul's disgruntled customers tried to take their business elsewhere, the other insurance companies refused to sell them malpractice policies of any sort. Believing this to be the result of an unlawful conspiracy in restraint of trade, plaintiffs sought injunctive relief and treble damages.[2] The viability of their suit depends on the scope of the McCarran-Ferguson Act. 15 U.S.C. §1011-15.

The Act must be placed in historical context if it is to be understood. For many years, from 1869 to 1944, the Supreme Court steadfastly maintained that insurance was not "commerce" and that state regulation of insurance did not impinge on the federal government's power to regulate interstate commerce. *See, e.g., Paul* v. *Virginia,* 75 U.S. (8 Wall.) 168 (1869). In 1944, however, the Supreme Court repudiated the principle that insurance is not commerce and held that federal antitrust laws could constitutionally be applied to insurance companies. *United States* v. *South-Eastern Underwriters Ass'n,* 322

1. An "occurrence" policy protects the holder from liability for any act done while the policy is in effect; a "claims made" policy, in contrast, protects the holder only against claims made during the policy's life. Thus a doctor who practiced for only one year, say 1972, would need only one 1972 "occurrence" policy to be fully covered, but he would need several years of "claims made" policies to protect himself from claims arising out of his acts in 1972.

2. At our request, both sides briefed the question of whether the plaintiffs' antitrust claim was mooted when the state of Rhode Island formed a joint underwriting association to provide malpractice insurance. Because of the state's action, St. Paul never gathered the fruits of the alleged conspiracy. Nonetheless, we are convinced that, for purposes of our jurisdiction, the state's act did not extinguish plaintiffs' every claim for relief. *United States* v. *Concentrated Phosphate Export Ass'n, Inc.,* 393 U. S. 199, 203-04 (1968). We do not decide whether plaintiffs were in fact "injured in [their] business or property". 15 U.S.C. §15. *Cf.* n.7 *infra.* Nor do we decide whether this would be an appropriate case for injunctive relief.

U.S. 533 (1944). This decision left the nation's insurance companies and the states' regulatory bodies dumbfounded; suddenly, state taxation and regulation of insurance seemed open to serious constitutional doubts. Federal authorities were loath to assume the burden of substituting national for state supervision of insurance.

To restore some certainty, Congress passed the McCarran-Ferguson Act in 1945. The Act made it clear that state regulation and taxation of insurance could continue. It also narrowed the impact of federal law on the insurance business, stating that "the Sherman Act, . . . the Clayton Act, and . . . the Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law." 15 U.S.C. §1012(b). This provision allows the states to engage in a kind of "reverse preemption", and the states were quick to enact the necessary laws.

The parties agree that the defendants' acts were related to the business of insurance and that Rhode Island effectively regulates that business. *Cf. SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969); *FTC* v. *Travelers Health Ass'n*, 362 U.S. 293 (1960). The controversy in this case centers on an exception to the "preemptive" powers of the states: "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 15 U.S.C. §1013(b).

The district court concluded that "despite this provision's board wording, which on first glance seems to support the plaintiffs' position, Congress intended this exception to be narrowly applied and that it does not, in fact, cover the situation presented in this case." It held

that the "boycott, coercion, and intimidation" exception was intended by Congress solely to protect insurance agents or other insurance companies from being blacklisted by combinations of companies, and was not intended to have any bearing on the insurer-insured relationship. It also observed that a contrary holding would vitiate the McCarran-Ferguson Act by, presumably, cutting deeply into the area of regulation which has been given to the states. In so holding, it relied on the only case authorities which had dealt with this issue. *Addrisi* v. *Equitable Life Assurance Soc'y*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975); *Meicler* v. *Aetna Cas. & Sur. Co.*, 506 F.2d 732 (5th Cir. 1975); *Transnational Ins. Co.* v. *Rosenlund*, 261 F. Supp. 12 (D. Ore. 1966).

Six other district courts have now taken the same view. *Mathis* v. *Automobile Club Inter-Ins. Exch.*, 410 F. Supp. 1037 (W.D. Mo. 1976); *Proctor* v. *State Farm Mut. Auto. Ins. Co.*, 406 F. Supp. 27 (D. D.C. 1975); *McIlhenny* v. *American Tit. Ins. Co.*, 418 F. Supp. 364 (E.D. Pa. 1976); *Royal Drug Co.* v. *Group Life and Health Ins. Co.*, 415 F. Supp. 343 (W.D. Tex. 1976); *Seasongood* v. *K & K Ins. Ag'cy*, 414 F. Supp. 698 (E.D. Mo. 1976), *rev'd on other grounds*, —— F.2d —— (8th Cir. Jan. 6, 1977); *Frankford Hosp.* v. *Blue Cross*, 1976-2 Trade Cas. ¶61,030 (E.D. Pa. 1976).[3]

3. In attacking the district court's decision, appellants cite an additional case from the Fifth Circuit. *Battle* v. *Liberty Nat'l Life Ins. Co.*, 493 F.2d 39 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975). Although appellees correctly point out that *Battle* is distinguishable and that it was decided before *Meicler, supra*, the *Battle* court did show a willingness to give the boycott provision a straightforward reading, an attitude that we share. *See also Ballard* v. *Blue Shield*, 543 F.2d 1075, 1078 (4th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3601 (Mar. 8, 1977).

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Since we feel compelled to disagree with this rather formidable array of authorities, we first try to summarize as fairly as we can the bases for their decision. We then make our own analysis of the wording of the statute and its legislative history. The line of cases begins with *Transnational Ins. Co.* v. *Rosenlund, supra.* Although the *Transnational* court found that it was not faced with a boycott even within the ordinary meaning of that word, it announced in passing that the boycott provision

> "was placed in the legislation to protect insurance agents from the issuance by insurance companies of a 'black-list,' which would name companies or agents which were beyond the *pale*. This list, in effect, was a directive to an agent not to write insurance in the name of or for the black-listed companies; otherwise, he would be stripped of his agency and not permitted to write insurance for any of the members of the governing organization of insurance companies." 261 F. Supp. at 26-27 [footnote omitted].

Only blacklisting by an insurance company, the court intimated, was subject to the Sherman Act under this provision. The court, though referring broadly to "the legislative history", cited only a single page of the Congressional record in support of this reading. 91 Cong. Rec. 1087 (1945). *Transnational* stood alone until 1974, when the Fifth and Ninth Circuits followed its lead. The courts of appeals simply adopted without elaboration the *Transnational* court's discussion of "the" legislative history. One reason for taking so narrow a view of the provision was the courts' apparent fear that any other reading would "emasculate", *Meicler, supra,* 506 F.2d at 734, or "vitiate",

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Addrisi, supra, 503 F.2d at 729, the McCarran-Ferguson Act. To fend off this danger, the *Meicler* court adopted a rule that policyholders or members of the public could not seek the benefit of the boycott provision. Later cases have followed these pioneers without adding to their analysis.

As will be seen, we disagree with the conclusion reached by these courts. Simple disagreement might not be enough if the insurance business had long relied on authoritative rulings in other circuits. That is not the case here. The view we reject was not advanced until 1966, when a single district court suggested it. Only in the past three years has its narrow reading of the boycott provision begun to gain more general favor. What prevents us from following the trail blazed by the *Transnational* court is its decision to go behind the statutory language. We would be justified in probing legislative history if the language were ambiguous or if, even though unambiguous, the language literally read produced a senseless or unworkable statute. *Massachusetts Financial Serv., Inc.* v. *Securities Investor Protection Corp.,* 545 F.2d 754 (1st Cir. 1976). *Cf. United States* v. *Slater,* —— F.2d —— (1st Cir. Dec. 22, 1976).

The words "agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation", within the context of the Sherman Act, do not appear to us as ambiguous. In antitrust law, a boycott is a "concerted refusal to deal" with a disfavored purchaser or seller. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959).[4]

4. Most cases have dealt with boycotts directed against retailers or other links in the chain of production and distribution. *E.g., Fashion Originators' Guild of America, Inc.* v. *FTC,* 312 U.S. 457 (1941); *Radiant Burners, Inc.* v. *Peoples Gas Light and Coke Co.,*

(footnote continued on next page)

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Concerted refusals by a number of companies to sell malpractice insurance policies to doctors who were dissatisfied with the policy offered by their insurer would seem to fit within this definition of boycott. Indeed appellees make no argument to the contrary. Nor do the cases attempt to justify their excursion into legislative history on the basis of ambiguity of language.

The articulated justification is based on the supposed "vitiation" of the McCarran-Ferguson Act if the boycott provision were to be given its normal Sherman Act scope. We observe first that a license to construe statutory words narrowly to avoid defeating legislative purpose is not to be cavalierly exercised. Under the McCarran-Ferguson Act,

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364 U.S. 656 (1961). Consumers have less frequently been prey to illegal boycotts, perhaps because a large class of victims cannot easily be coerced without destroying the secrecy on which illegal boycotts often depend. But the features that make boycotts objectionable do not disappear when consumers are boycotted. Like boycotts aimed at retailers, concerted refusals to deal with consumers may restrain traders' "ability to sell in accordance with their own judgment"; they can deprive consumers of the "freedom to buy . . . in an open competitive market"; and they "interfere with the natural flow of interstate commerce". *See Klor's, Inc.* v. *Broadway-Hale Stores, Inc., supra,* 359 U.S. at 212-13. The Ninth Circuit has held that a boycott of customers is a boycott for antitrust purposes. *Washington State Bowling Proprietors Ass'n* v. *Pacific Lanes, Inc.,* 356 F.2d 371, 376 (9th Cir.), *cert. denied,* 384 U.S. 963 (1966).

Some commentators would artificially restrict the meaning of "boycott", apparently fearing an overbroad application of the rule that boycotts are illegal per se. *See* L. Sullivan, *Antitrust* §§83, 90 (1977). This fear may be allayed more directly by recognizing that, while some boycotts are irredeemably anticompetitive and thus fit subjects for a per se rule, others are benign and not properly treated as illegal per se. *See* P. Areeda, *Antitrust Analysis* 287 (1967); *see also Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71 (9th Cir. 1969) (boycott not illegal per se when participants had no anti-competitive motive). Certainly nothing in this opinion requires the application of a per se rule to all acts falling within the ordinary meaning of the word "boycott".

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states were given authority to tax and regulate the business of insurance. This domain remains a vast one even if the boycott provision is read more broadly than appellees insist. McCarran-Ferguson would still insulate state tax and regulatory programs from challenges based on the dormant commerce clause. *See Prudential Ins. Co.* v. *Benjamin,* 328 U.S. 408 (1946). It would continue to protect the business of insurance from many federal regulatory statutes. *See, e.g., SEC* v. *National Securities, Inc., supra* (securities laws). Even within the antitrust field, McCarran-Ferguson would have great significance. Only the Sherman Act is made applicable to the business of insurance by the boycott provision; the Clayton and Federal Trade Commission Acts, for example, could still be "preempted" by state regulation. Moreover, not every violation of the Sherman Act can be characterized as an act of boycott, coercion, or intimidation. *See, e.g., United States* v. *Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945) (use of "benign" means to maintain monopoly violates Sherman Act); *Standard Oil Co.* v. *United States,* 221 U.S. 1, 43 (1911) (predatory pricing).

Nor would the introduction of antitrust principles into dealings between policyholders and insurers hamstring the state regulatory bodies that have primary responsibility for overseeing the nation's insurance business. A necessary regulatory measure could seldom be successfully challenged as a state-inspired "boycott, coercion, or intimidation", for the boycott provision merely guarantees that "[n]othing in *this chapter* shall render the Sherman Act inapplicable" to boycotts and the like. 15 U.S.C. §1013(b) [emphasis

added]. The chapter in question is the McCarran-Ferguson Act. The boycott provision merely neutralizes that Act, leaving intact the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), which today insulates state regulatory schemes outside the insurance context from antitrust liability. *See also Cantor* v. *Detroit Edison Co.*, —— U.S. —— (July 6, 1976). Indeed, *Parker* v. *Brown* may have added strength in the insurance field because of the policies reflected in the McCarran-Ferguson Act. But there is a large difference between allowing a state to fix insurance rates without fear of antitrust sanctions and similarly insulating companies which, outside any state-permitted structure or procedure, agree among themselves that customers dissatisfied with the coverage offered by one company shall not be sold any policies by any of the other companies. Contrary to the argument of some of the appellees, giving normal scope to the boycott provision will not plunge federal courts into the enterprise of retroactive rate-making. Regulation by the state would be protected; concerted boycotts against groups of consumers not resting on state authority would have no immunity.

When we look to public policy, the limitation sought by appellees again lacks support. Throughout this century, preserving competition by means of the antitrust laws has been a continuing national purpose. A primary aim of antitrust law is assuring consumers the benefits of a free market economy. To exclude consumers of insurance from the protection afforded by the boycott provision thus cuts against a basic policy of antitrust law. Such an interpretation also conflicts with the Supreme Court's view that the McCarran-Ferguson Act as a whole is meant to apply to

the relationship between policyholders and their insurers. *SEC* v. *National Securities, Inc., supra,* 393 U.S. at 460. The boycott provision presumably also reflects this concern for the insurer-insured relationship. On a broader scale, we note that legislative and judicial exceptions to the general rule favoring free competition have often been narrowed over the years. *See, e.g., Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (July 6, 1976) ("state action" exception restricted); *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 785-88 (1975) ("learned profession" exception questioned); *United States* v. *International Boxing Club of New York, Inc.,* 348 U.S. 236 (1955) (refusing to extend "baseball" exemption to boxing); *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384 (1951) (narrow view of Miller-Tydings "fair trade" exception). The McCarran-Ferguson Act is of course a legislative exception to the antitrust laws, and it deserves a fair reading.[5] But the artificial reading of the boycott provision that appellees urge on us can only be characterized as a judge-made expansion of the Act. We think the national commitment to a free market places a special burden on courts to think long and hard before creating such exceptions to the antitrust laws. In short, the usual reading of "boycott, coercion, or intimidation"

5. We cannot ignore, however, the great haste with which the Act was drafted and passed. The provision that all now agree is central to the Act—the exception of insurance to the extent that it is regulated by state law—did not appear in the Act until it was inserted by the House and Senate conferees. *See* 91 Cong. Rec. 488 (1945); *id.* 1945; *id.* 1396. Only at the last moment did a measure that was intended originally as a three-year moratorium on Sherman and Clayton Act coverage become a lasting exemption. This change was not noted in the conference report or the statement of the House conferees, *id.,* although it was uncovered by Senator Pepper in the floor debates. *Id.* at 1478.

does not lead to irrationality, nor does it pose a grave danger to state authority. It conforms to the nation's antitrust policies. We see no reason, therefore, to look to the legislative history for a special and narrow meaning of these words.

Nevertheless, in deference to the courts which have found support in that history, we have studied it in detail. The decision in *South-Eastern Underwriters, supra,* was issued on June 5, 1944. That decision approved an indictment charging that the members of an insurance underwriters' association "not only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force nonmember insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from [association] members on [association] terms." 322 U.S. at 535. Following that decision, an intensive several-month period of discussion produced a compromise measure agreed to generally by the insurance industry. The right of states to collect taxes from insurance companies had been put in doubt; the states' tax collecting effort would normally take place between February 20 and March 10, 1945. Thus legislative consideration was expedited, debate taking place between January 25 and February 27, 1945. The reports accompanying the bills being debated both referred to the boycott provision, stating "These provisions of the Sherman Act remain in full force and effect."[6]

In the first Senate debate, on January 25, the boycott provision was broadened by a quickly accepted amendment

6. S. Rep. No. 20, 79th Cong., 1st Sess. (1945), accompanying S. 340; and H. Rep. No. 143, 79th Cong., 1st Sess. (1945).

from "Nothing contained in this section shall render the Sherman Act inapplicable to any agreement or act of boycott . . ." to "Nothing in this act . . ." 91 Cong. Rec. 479 (1945). The chief issue debated, reflecting Senator O'Mahoney's concern, was whether the act could be used to authorize attempts to monopolize. Senator Ferguson, a sponsor, gave the answer: "No. I will answer that by saying that if agreements in restraint of trade or to monopolize amounted either to a boycott and/or coercion and/or intimidation, they would be absolutely void . . . ." *Id.* at 480.

The bill was debated in the House on February 14. The language concerning "agreement" to boycott had been stricken in committee, but the deletion was challenged by Congressman Celler, who said his concern reflected the view of the Attorney General. Congressman Celler, in arguing for the restoration of "agreement" language, adverted to the danger of an oral blacklist being issued by large companies which "would frighten the wits out of all these small companies", and an agreement of "separation" barring a company whose agent wrote insurance for a blacklisted company from participation in "the self-constituted governing organizations". *Id.* at 1087. On Congressman McCormack's suggestion, language was accepted proscribing "any agreement to boycott, coerce, or intimidate". Much of the debate then focused on the nature of the moratorium of three years on the general application of the Sherman and Clayton Acts.

The bill went to conference. The House, on February 23, agreed to the conference report without debate. In the Senate, on February 26, Senator Pepper was concerned about states taking action during the moratorium period

which would defeat the purpose of the antitrust acts. Senator Ferguson replied that states could not, even during the moratorium, "interfere with the application of the Sherman Act to any agreement . . . or . . . act of boycotting". *Id.* at 1443. On the next day, Senator Pepper levelled his attack at the basic provision making the Sherman, Clayton, and Federal Trade Commission Acts permanently inapplicable to the extent that states had regulated the industry. His concern was that price fixing could continue with impunity. Senator O'Mahoney reassured him that private agreements enforcing certain rates would remain violations with the restoration of the "agreement" language taken out but restored by the House. He added:

> "Therefore any attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which was attempting to do business in the insurance field in a way that was disapproved by them, would be absolutely prohibited by this provision." *Id.* at 1480.

Senator Pepper was not satisfied, believing that states could legitimize and therefore insulate rating bureaus. Senator Ferguson pointed out that "there are six things on which a State could not legislate. They are boycott, coercion, or intimidation, or agreements to boycott, coerce, or intimidate." *Id.* at 1481. He acknowledged that states would be permitted to authorize rating bureaus. Senator Pepper continued to gnaw at the issue, asking why the states should be given the right to "cloud" the Sherman and Clayton Acts. Again Senator O'Mahoney attempted reassurance by saying that there were three forms of regulation: state regulation permitted by the bill, federal regulation, which no one was urging, and private regulation by combinations "through private rules and regulations under which persons engaged in the insurance industry could be tried and convicted for the violation of private law". *Id.* at 1483. This latter type, he said, would be absolutely outlawed. Senator Pepper still felt that, with state-authorized rating bureaus being allowed by the bill, states were being given "carte blanche" to legitimize vices. *Id.* at 1484.

Senator O'Mahoney rejoined that "[t]he vice in the insurance industry . . . was not that there were rating bureaus, but that there was in the industry a system of private government which had been built up by a small group of insurance companies, which companies undertook by their agreements and understandings to invade the field of Congress to regulate commerce." *Id.* at 1485. After reading from the elaborate rules and regulations of a powerful association of insurance companies the Senator said, "The Insurance Executive Association undertook by regulation to coerce, intimidate, and boycott its own members and compel them to obey the rules and regulations the association itself prescribed." *Id.* at 1486.

Senator Barkley then asked if the boycott provision was sufficient to prevent combinations that do not involve boycott, coercion, or intimidation. Senator O'Mahoney replied,

> "[M]y judgment is that every effective combination or agreement to carry out a program against the public interest of which I have had any knowledge in this whole insurance study would be prohibited by the [boycott] section . . . . There are agree-

> ments and combinations in the public interests [sic] which can safely be permitted, but this agreement from which I have been reading is the sort of agreement which ought to be condemned . . . and which . . . would be completely outlawed." *Id.* at 1486.

The debate shortly ended and the conference report was accepted.

Assuming for the moment that we have license to go beyond the words of the statute, we cannot turn to the legislative history with our minds in equipoise. H. Hart and A. Sacks, *The Legal Process* 1264 (tent. ed. 1958). The plain meaning of the boycott provision, the strength of the nation's antitrust policies, and the substantial scope that an ordinary reading of the provision would leave to the McCarran-Ferguson Act—all these at the least create a presumption for the legislative history to overcome. Our question, then, is whether we can distill from this history the clear intent of Congress to limit "boycott, coercion, or intimidation" to acts or agreements affecting the relationships between insurance companies and their competitors and agents. The basis for appellees' argument lies in the remarks of Congressman Celler about the danger of blacklisting small companies and Senator O'Mahoney's remarks about the evil of private enforcement of private law by the companies. And it is true that at no point were any remarks directed to the possibility of boycotts, coercion, or intimidation aimed at consumers.

We would hesitate long before characterizing the Congressional intent as one narrowly restricting the boycott provision. We make two preliminary observations. The first is that *South-Eastern Underwriters,* which seems to

have been the ultimate source of the "boycott, coercion, or intimidation" language, apparently dealt in part with threats and boycotts directed at policyholders. 322 U.S. at 535. The second is that the insurance industry participated deeply in the drafting of this legislation; if the boycott provision were intended to cover less than what the Sherman Act would normally cover, one might suppose that the language would not have been left so bald and general.

Of more pertinence is the central role which the boycott provision played as the all purpose safety valve. It was amended twice, in each case to make it broader, first by making it effective across the entire Act and second by restoring the agreement language. Time after time the concerns of skeptics and opponents were met by reference to this provision. We cannot imagine that they would have been at all satisfied if they had understood that "boycott" was a code word confined to industry personnel. *See,* Levi *An Introduction to Legal Reasoning,* 15 U. Chi. L. Rev. 501, 522 (1948). The inescapable fact is that in this four-day debate the only specific references to evils were made on two occasions, once in the House and once in the Senate. Congressman Celler voted against the bill in the House and while Senator O'Mahoney was supporting the measure as an acceptable compromise and was on the committee of conference, he was not a sponsor. While the vice of insurance company self-government outside the law obviously lay in their minds as a major evil to be combatted by the legislation, there is no suggestion that the legislation was limited to that evil. Indeed Senator O'Mahoney referred to the Insurance Executives As-

sociation rules as "the sort of agreement" to be condemned. His summary answer to Senator Barkley that "every effective combination or agreement to carry out a program against the public interest" would be prohibited by the boycott section could not be more unrestricted.

We simply do not find in these debates or reports any evidence that would justify our reading the boycott provision in the special way urged by appellees. With all deference to the courts which have accepted the argument, we are reminded of the following advice of Mr. Justice Frankfurter:

> "Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute. While courts are no longer confined to the language, they are still confined by it. Violence must not be done to the words chosen by the legislature. Unless indeed no doubt can be left that the legislature has in fact used a private code, so that what appears to be violence to language is merely respect to special usage." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 543-44 (1947).

We therefore reverse the lower court on this issue. The plaintiffs have charged the defendants with an unlawful boycott, and they are entitled to seek both injunctive relief and treble damages. *See Monarch Life Ins. Co.* v. *Loyal Protective Life Ins. Co.*, 326 F.2d 841 (2d Cir. 1963), cert. denied, 376 U.S. 952 (1964).[7]

7. We recognize that the dismissal could be affirmed if none of the plaintiffs have standing to sue. But the change in malpractice coverage has increased costs for the doctors. The alleged conspiracy

(footnote continued on next page)

The plaintiffs also object to the district court's decision to abstain on the plaintiffs' fraud claims, which were based on state law. In essence, plaintiffs pleaded that past and present insurance rates had been inflated by false statements to the public and the state insurance commissioner. Plaintiffs asked for restitution of all amounts paid in excess of a "fair and justifiable" malpractice insurance rate. Rhode Island courts have never ruled on the existence of a cause of action for recovery of excessive insurance premiums, but the district court noted that the state has provided elaborate administrative and judicial procedures for challenging existing rates. Rather than risk interfering with the state's regulatory scheme or misinterpreting state law, the district court abstained. Plaintiffs are apparently satisfied with the district court's decision to abstain with respect to insurance rates now in effect, for they do not appeal from that disposition. They do appeal from the court's abstention regarding past rates, which cannot be challenged administratively. The court's reluctance to take the case is understandable; recognizing a cause of action for the recovery of excessive past insurance premiums would profoundly affect the state's ratemaking machinery and policies. *See Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943); *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25 (1959). In cases like this, federal courts prefer to tread lightly, following trails already blazed by the

thus strikes at their "business or property", 15 U.S.C. §15, even if that phrase refers only to "commercial interests". *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 264 (1972). And no one is more directly injured by a conspiracy among insurance sellers than those who buy the insurance. *See generally*, L. Sullivan, *Antitrust* §247 (1976). Because the doctors named as plaintiffs have standing, we find it unnecessary to decide whether the patients have standing or not.

state courts. Nonetheless, the court's jurisdiction over this claim was founded on diversity of citizenship. Abstaining in a diversity case often means completely relinquishing the case to the state courts; it thus defeats the purposes behind the grant of federal jurisdiction. A less drastic step might have served the purposes of the grant without unduly interfering in state regulatory matters. In Rhode Island, a novel and controlling question may be certified from the federal courts to the state courts. *See Lehman Bros.* v. *Schein,* 416 U.S. 386 (1974); R. I. Sup. Ct. Rule 6.

The district court did not certify this question. Two reasons for its choice are now advanced. First, the court's unappealed decision to abstain on the present rate question means that state courts and administrators will soon be wrestling with plaintiffs' claim, and it would not serve judicial economy for the federal court to begin work on a closely related claim. Second, even if a cause of action for recovering past premiums is proper, the federal court should abstain for fear of disrupting important state concerns. We doubt that either of these factors alone would permit abstention when balanced against the duty imposed on every federal court to decide cases within its jurisdiction. *See Meredith* v. *Winter Haven,* 320 U.S. 228 (1943). In combination, however, they persuade us that abstention was justifiable. *See Louisiana Power & Light Co.* v. *City of Thibodaux, supra,* 360 U.S. at 27 n. 2.

Appellants also object to the granting of summary judgment to two defendants, the Aetna and St. Paul insurance companies, on a count charging fraud in the sale of certain "consent to rate" policies. Plaintiffs offered

no evidence that any named physician-plaintiff ever bought such a policy from either Aetna or St. Paul, nor that any named patient-plaintiff was ever treated by a doctor holding such a policy. Appellants thus had at best only a tenuous right to bring this claim against these companies, *Haas* v. *Pittsburgh Nat'l Bank,* 526 F.2d 1083 (3d Cir. 1975), and we find no error in the district court's decision to adhere strictly to the traditional rules. *La Mar* v. *H & B Novelty & Loan Co.,* 489 F.2d 461, 469 (9th Cir. 1973). *See also O'Shea* v. *Littleton,* 414 U.S. 488, 494-95 (1974).

The district court disposed of the remaining charges of fraud in "consent to rate" policies by referring to Fed. R. Civ. P. 9(b). Rule 9(b) requires complaints charging fraud to state "with particularity" the circumstances constituting fraud. The judge found that the complaint did not meet the standards set by rule 9(b) and dismissed the count without prejudice. The judge was correct; the complaint could hardly be more vague. While the judge might have ordered a more definite statement, it was within his power to grant a dismissal without prejudice. If the plaintiffs can plead fraud with more particularity, they may file an amended complaint. 2A Moore's Federal Practice ¶9.03 p. 1934.

Affirmed in part; reversed and remanded in part.

Appendix A

Dissenting Opinion

CAMPBELL, *Circuit Judge* (dissenting in part). The court seems to me to be straining mightly to reinterpret the legal relationship ordinarily understood to have been established under the McCarran-Ferguson Act, perhaps because it has some doubts about the policies of that Act.

The McCarran-Ferguson Act declares that "the continued regulation and taxation by the several States of the business of insurance is in the public interest", 15 U.S.C. §1011, and "shall be subject to the laws of the several States which relate to the regulation or taxation of such business", §1012(a).[1] The Act goes on to say that no Act of Congress shall invalidate, impair or supersede state regulatory laws, §1012(b). Finally, it provides that the various antitrust statutes, including the Sherman Act, shall apply only to the extent a state does not exercise its right to regulate, §1012(b). The court concedes, as do the parties, that Rhode Island has exercised its right to regulate all material aspects of the business of insurance and that the actions complained of relative to withholding malpractice insurance were all part of such regulated business. Thus, under the clear implication of §1012, neither the Sherman Act nor the other antitrust laws apply except insofar as the §1013(b) exception permits. That exception provides, "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or in-

1. The Supreme Court has said that "[t]he relationship between insurer and insured, the type of policy which [can] be issued, its reliability, interpretation, and enforcement—these [are] the core of the 'business of insurance' " covered by the McCarran-Ferguson Act. *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969).

Appendix A

timidate, or act of boycott, coercion, or intimidation." Significantly this language does not track the broad "contract, combination . . . or conpiracy" language of the Sherman Act which Congress reasonably might have chosen had the intent been, as my brothers state, to encompass in the exception virtually all activities in violation of the Sherman Act involving more than an individual monopolist.

While the precise scope of the exception language may be less than crystal clear, given the statutory scheme, I have no difficulty understanding why two circuit courts and six district courts—every court except, now, ourselves—have held that the §1013(b) exemption is to be read narrowly as describing boycotts, coercion or intimidation directed against other companies and agents rather than, broadly, as also encompassing the gamut of company-policyholder relations. *See, e.g., Meicler* v. *Aetna Casualty & Surety Co.*, 372 F. Supp. 509, 513-14 (S.D. Tex. 1974), *aff'd*, 506 F.2d 732 (5th Cir. 1975). The legislative history indicates that the former problem was what worried Congress when it enacted the exception, and a narrow reading is more consistent with §1012 and with the purpose and structure of the act generally.[2] Indeed, to read §1013(b) expansively is to hold that what Congress gave with one hand it took with the other, since while my brothers' reading does not introduce the entirety of federal antitrust law

2. I do not question that the boycott-coercion-intimidation language might in some other context be pushed to the limits which the court approves. But these words are hardly so focused as to permit only the broadest, most general meaning. A more limited interpretation, besides comporting with the statutory structure and the legislative history, squares with the Supreme Court's definition of a group boycott as "concerted refusals by traders to deal with other traders",

(footnote continued on next page)

into the business of insurance, it introduces a very major part thereof and does so with no clear explanation of why Congress should first take pains to eliminate the antitrust laws and then reintroduce by the back door most of the Sherman Act. Only if, like all other courts, we read §1013 (b) as dealing with a limited type of problem which troubled Congress does the exception fit sensibly into the statute as a whole.

The central thread running through the McCarran-Ferguson Act is that regulation of insurance rates and policies—both of them matters falling under the general heading of relations between companies and policy holders —is left to the states. The present litigation brought by physicians who believe that they have been deprived, unfairly, of insurance on terms that are economically favorable focuses precisely upon company-policyholder matters. My brothers are now putting the federal courts in the same arena as the State of Rhode Island, contrary, I believe, to the purposes of the McCarran-Ferguson Act. Doubtless the federal perspective is somewhat different but the poten-

Klor's Inc. v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959). *See* L. Sullivan, Antitrust §90 at 257 (1976).

Furthermore, even reading the boycott exception to include the complained of behavior does not wholly solve the question of plaintiffs' standing. If St. Paul is attempting to corner the malpractice market, the more obvious harm is to those companies that are being closed out. It can be argued that the higher prices to doctors are only an indirect consequence and that the physicians have not suffered the sort of direct injury necessary to bring suit. *See Battle* v. *Liberty National Life Insurance Co.*, 493 F.2d 39, 49 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975) (plaintiff must show himself to be in sector of economy in which violation threatens to break down competitive conditions). This sort of problem suggests that the doctors' ostensible antitrust action is aimed less at protecting the free market system than at consumer protection goals left by Congress to state regulation. *See generally SEC* v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969).

tial for conflict between state regulation and federal antitrust policies is real and the decision has the effect of substantially undercutting §1012(b) of the Act.

This is, I think, a most unfortunate decision. It not only introduces a new category of federal antitrust suit which will be very difficult to manage at a time when federal courts are strained to the limit, but it could have unforeseeable effects upon state regulatory policies. Plaintiffs may see this case as another string to their bow in attempting to deal with the crushing malpractice burdens being imposed as the result not only, perhaps, of predatory insurance practices but of inflated claims and verdicts. We might sympathize with them without going this far. The State of Rhode Island has apparently now enacted regulatory legislation dealing with some or all of the problem—a means of redress which seems far more responsive to the problem than any likely to be achieved through reinterpreting the McCarran-Ferguson Act thirty years after enactment.

I shall not attempt to deal with the legislative history which my brothers make much of, beyond saying that, like most legislative history, it is capable of being argued both ways depending on which legislator one reads and to whose views one ascribes final authority. Certainly, in the expressed concerns of the legislators there is explicit support for the view which all other courts have adopted to date. More important to me, however, is the statutory scheme which suggests, in the positioning of the exception, and in the very fact that the exception is just that, that §1013(b) should be construed in a manner complementary to, rather than subversive of, the major premises of the Act. Under my brothers' reading, the tail now wags the dog.

I would affirm the district court which acted, I think, correctly and in accordance with all existing law.

Appendix B

Opinion of the District Court of the United States for the District of Rhode Island

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 75-176

DAVID M. BARRY, M. D. *et al.*

v.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, *et al.*

OPINION

(Rendered orally from the bench November 19, 1975)

PETTINE, Chief Judge. This is a class action brought on behalf of practicing physicians licensed to practice medicine in the State of Rhode Island and on behalf of citizens of Rhode Island who are presently under the care of physicians or who may require medical care in the future. The action is brought against four insurance companies, licensed to sell insurance in the State of Rhode Island, who are, and have been, engaged in selling medical malpractice insurance to physicians, hospitals, and other medical personnel in Rhode Island. The plaintiffs' amended

complaint alleges, in essence, that the four defendants have conspired to monopolize the business of selling medical malpractice in Rhode Island and, in violation of both federal antitrust law and state common law have, through various unfair trade practices and fraudulent misrepresentations, obtained the approval by the State Insurance Commissioner of excessive medical malpractice premium rates and have thereby been unjustly enriched at the plaintiffs' expense. Plaintiffs seek injunctive relief and $100,000,000 in damages. The case is presently before the Court on several motions by the defendants for dismissal on various grounds of all four counts of the complaint and for summary judgment on one of the counts.

I. COUNT I

Count I of the plaintiffs' amended complaint purports to set forth a private action under the federal antitrust laws. The gravaman of Count I is that the four defendant insurance companies violated sections 1 and 2 of the Sherman Act by conspiring to deny any medical malpractice insurance coverage on an occurrence basis to providers of medical services insured under malpractice policies issued by defendant St. Paul and by conspiring that defendants Aetna, Travelers, and Hartford would refuse to accept any applications for medical malpractice insurance of any type from providers presently insured by St. Paul. Plaintiffs contend that these conspiracies have been effectuated by a collective refusal to deal, by unfair insurance rate discrimination, by agreements not to compete, and by horizontal price fixing, and that the defendants have engaged in a

purposeful course of coercion, intimidation, boycott, and unfair competition with respect to the sale of medical malpractice insurance in Rhode Island.

All four defendants have moved that Count I be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted on the grounds that plaintiffs' claims under the Antitrust Acts are barred by the McCarran-Ferguson Act, 15 U.S.C. §§1011-1015, which allegedly exempts the defendants' challenged activities from the Antitrust Acts. In addition, three defendants have also argued that Count I should be dismissed because events occurring subsequent to the events alleged in Count I have rendered plaintiffs' action moot. The Court need not reach this mootness question because I find that Count I of the plaintiffs' amended complaint is barred by the McCarran Act.

The McCarran Act provides in pertinent part:

> "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948 . . . the Sherman Act, . . . the Clayton Act, and . . . the Federal Trade Commission Act, . . . shall be applicable to the business of insurance to the extent that such business is not regulated by state law."
> 15 U.S.C. §1012(b).

The Act also contains the following exception:

> "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to

> boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."
> 15 U.S.C. §1013(b).

It is not contested that the subject of this action is the "business of insurance." This case involves the relations between the defendant insurers and the insured physicians and hospitals,[1] the types and terms of the policies that are or that plaintiffs claim ought to be sold, and the rates to be charged therefor. These matters are precisely those aspects of the business of insurance Congress was considering in the McCarran Act:

> "Congress was concerned with the type of state regulation that centers around the contract of insurance . . . The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.' . . . [I]t is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the 'business of insurance.'"
> *S.E.C.* v. *National Securities, Inc.,* 393 U.S. 453, 460 (1969).

Nor is it contested that the business of insurance is extensively regulated by the State of Rhode Island. For example, every foreign insurance company must obtain a license from the Insurance Commissioner each year before it

1. Although none of the named plaintiffs are hospitals, plaintiffs apparently consider hospitals in Rhode Island to be a part of the plaintiff class. All questions relating to class certification have been deferred until after resolution of the present motions.

can transact business in Rhode Island, R.I. Gen. Laws §27-2-11, and premium rates may not be excessive or unfairly discriminatory, R.I. Gen. Laws §27-9-4. Moreover, chapter 27-29 of Rhode Island's General Laws, entitled "Unfair Competition and Practices" was enacted with the explicit purpose of regulating the very misconduct and practices that, but for the McCarran Act, would be controlled by federal antitrust laws:

> "The purpose of this Chapter is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the act of congress of March 9, 1945 (public law 15, 79th congress) [i.e., the McCarran Act] by defining—or providing for the determination of—all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined and determined."
> R.I. Gen. Laws §27-29-1.

In addition, the area of medical malpractice insurance has been singled out for more particular state regulation and control by Emergency Regulation XXI, issued by the Rhode Island Director of Business Regulation, Insurance Division, which went into effect on June 16, 1975.[2]

Since the defendants' alleged misconduct involves aspects of the insurance business regulated by state law, the

2. Under the Emergency Regulation was created the Medical Malpractice Joint Underwriting Association of Rhode Island, which represents a new and comprehensive program for the provision of medical malpractice insurance in Rhode Island. Under the program, every insurer authorized to write personal injury liability insurance in Rhode Island is required to participate in the Association and to assist in the provision of medical malpractice insurance to providers of medical services in Rhode Island.

plaintiffs' private antitrust action is barred by the McCarran Act unless it falls within the exception for boycotts, coercion, or intimidation, 15 U.S.C. §1013(b), quoted *supra*. This Court is persuaded that, despite this provision's broad wording, which on first glance seems to support the plaintiffs' position, Congress intended this exception to be narrowly applied and that it does not, in fact, cover the situation presented in this case.

Both Courts of Appeals that have considered similar attempts to invoke the exception in 15 U.S.C. §1013(b) have concluded that such an application of the exception would be contrary to the legislative history of the Act and would "emasculate" and "vitiate" the Act and frustrate its purposes. *Meicler* v. *Aetna Casualty & Surety Co.*, 506 F.2d 732 (5th Cir. 1975); *Addrisi* v. *Equitable Life Assurance Society of the United States*, 503 F.2d 725 (9th Cir. 1974). *See also Transnational Insurance Co.* v. *Rosenlund*, 261 F.Supp. 12 (D.Ore. 1966). These cases hold that the purpose of the boycott, coercion, and intimidation exception was solely to protect insurance agents or other insurance companies from being "black-listed" by powerful combinations of insurance companies, not to affect the insurer-insured relationship. Thus, the District Court in *Meicler*, *supra*, explained:

> "This Court is convinced that Plaintiffs' reliance on §1013(b) is misplaced. It cannot be disputed that the terms boycott and coercion, as commonly defined, might be construed to encompass the type of activity attributed to Defendants in the instant case. An examination of the legislative history of this section reveals, however, that Congress was seeking to regulate a rather

> narrow area of activity bearing no resemblance to the situation described in Plaintiffs' Complaint. Section 1013(b) was designed primarily to deal with conspiracies or combinations among insurance companies and agents for the purpose of boycotting or refusing to deal with other insurance companies and agents. There is nothing in the legislative history or case law bearing on this section to indicate that it is applicable to a refusal by insurance companies to deal with particular segments of the public except under fixed classifications and premium rates."
> 372 F.Supp. 509, 513-14 (S.D. Tex. 1974).

"[T]o hold otherwise," wrote the Ninth Circuit in *Addrisi, supra,* "would vitiate the McCarran-Ferguson Act in its concept of setting over unto the several states the regulation, and protection of the insurer-insured relationship." 503 F.2d at 729.

This Court agrees with the interpretation of the legislative history of 15 U.S.C. §1013(b) presented in the *Meicler, Addrisi,* and *Rosenlund* decisions, *supra,* and adopts it as its own. Plaintiffs have failed to uncover any portion of the legislative history that would justify a contrary conclusion. The plaintiffs do cite and heavily rely upon the case of *Battle* v. *Liberty Nat'l Ins. Co.,* 493 F.2d 39 (5th Cir. 1974), *rehearing denied,* 503 F.2d 567, *cert. denied,* 419 U.S. 1110 (1975), however, contending that *Battle* stands for the proposition that §1013(b) can be applied to protect consumers as well as insurance companies and agents. The plaintiffs in *Battle,* however, were not insurance policyholders but rather business representatives of the insurance companies sued:

> "The plaintiffs in this class action are funeral homes and directors of funeral homes who allege that the defendants [insurance companies] are liable to them for violating the antitrust laws. . . . When the funeral home director signs a contract with [insurance companies], his funeral home becomes an 'authorized home for *servicing and furnishing merchandise to Liberty National burial insurance policyholders'.*"
> 393 F.2d at 42, 43. (emphasis added).

Thus, individual insureds were not parties to the action, and no exception to the McCarran Act was claimed for them. Furthermore, it should be noted that *Battle* was decided by the Fifth Circuit before it decided *Meicler* v. *Aetna Casualty & Surety Co., supra.* To the extent there is any inconsistency between the two cases, *Meicler* must be read as implicitly overruling *Battle.*

Plaintiffs in this case are individual insureds and their antitrust claims are thus not exempted by section 1013(b) from the limitations of the McCarran Act. Count I of plaintiffs' amended complaint is therefore dismissed.

II. COUNTS II, III, and IV

Count II of the plaintiffs' amended complaint is a diversity action based on the claim that the premium rates charged by the defendants for their malpractice insurance, as approved by the Rhode Island Insurance Commissioner, were excessive and were obtained by fraudulently concealing material facts, furnishing false information, and making material misrepresentations. Counts III and IV, also diversity actions are based on the conduct set forth in Counts I and II and allege that as a result of the defendants' fraudulent acts, Rhode Island was forced to create

a state agency to underwrite medical malpractice insurance that charges excessive premium rates, and certain plaintiff physicians were induced to purchase malpractice insurance at rates in excess of the maximum rates established by the Rhode Island Insurance Commissioner.

All the defendants have moved that Counts II, III, and IV of the amended complaint should be dismissed on the grounds that the allegations of fraud contained therein have failed to satisfy the special pleading requirements of Federal Rule of Civil Procedure 9(b). In addition, three of the defendants have moved that Counts II and III should be dismissed because plaintiffs failed to exhaust their state administrative remedies, or, in the alternative, that the Court exercise its discretion to abstain from exercising jurisdiction over these counts. These defendants have also moved for summary judgment in their favor on Count IV on the grounds that none of the named plaintiffs have any complaints against these defendants on the grounds alleged in Count IV and they therefore lack standing to bring the claims set forth in Count IV and are not members of the class they seek to represent.

The Court need not reach these questions, however, because it appears on consideration of a motion by defendant Travelers that this Court lacks jurisdiction to entertain any of the claims plaintiffs put forth in Counts II, III, and IV. As indicated *supra,* these three counts are all premised on diversity jurisdiction under 28 U.S.C. §1332. There is evidence before the Court, however, in the form of a communication from the Department of State of the State of Rhode Island, that defendant Travelers Indemnity Company of Rhode Island is a Rhode

Island Corporation. Since the named plaintiffs are all citizens of Rhode Island, there is a lack of complete diversity between all the plaintiffs on the one hand and all the defendants on the other, and thus under the well established rule there is no basis for the exercise of federal diversity jurisdiction. *Smith* v. *Sperling,* 354 U.S. 91 (1957); *Strawbridge* v. *Curtiss,* 3 Cranch. (7 U.S.) 267 (1806).[3]

Moreover, this it not an appropriate case for the Court to take pendent jurisdiction over Counts II, III, and IV. Even where the federal claim to which the state claims are to be appended is a substantial one, "pendent jurisdiction is a doctrine of discretion, not of plaintiffs' right. . . ." *United Mine Workers of America* v. *Gibbs,* 383 U.S. 715, 726 (1965). The policies underlying pendent jurisdiction are less significant when the federal claim is a weak one, and the Supreme Court has stated flatly that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *Id.* Although the Court has since retreated somewhat from this hard and fast rule, in *Rosado* v. *Wyman,* 397 U.S. 397, 404 (1970), where substantial time and energy had been expended toward resolution of the state claim, such considerations are not present here. This litigation is less than six months old, and all discovery has been stayed pending resolution of the present motions. In the words of the American Law Institute:

3. There is no basis in this case for a realignment of the parties, such as occurred in *Broidy* v. *State Mut. Life Assur. Co. of Worcester, Mass.,* 186 F.2d 490 (1951) or *Robinson* v. *Warner,* C.A. No. 5253 (D.R.I. 1973), that could sustain diversity jurisdiction.

> "If the federal element that is the basis for jurisdiction is disposed of early in the case, as on the pleadings, it smacks of the tail wagging the dog to continue with a federal hearing of the state claim."
>
> American Law Institute, Study of the Division of Jurisdiction between State and Federal Courts, Official Draft, 1969, at 213, quoted in *McFadden Express, Inc.* v. *Adley Corp.*, 346 F.2d 424, 427 (2d Cir. 1965), *cert. denied* 382 U.S. 1026.

A further reason for refusing pendent jurisdiction in this case is the Supreme Court's admonition that federal courts avoid needless decisions of state law, "both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers of America* v. *Gibbs, supra,* 383 U.S. at 726. It is clear from the defendants' motions to dismiss Counts II, III, and IV on grounds other than lack of jurisdiction that the ultimate resolution of the plaintiffs' claims in this case would require explorations of several novel questions of state law, such as whether the administrative remedies provided by Rhode Island's statutes regulating the insurance industry were intended by the state legislature to totally preempt any common law causes of action which may have existed for recovering excessive insurance premiums.[4] It is also

4. In *Catalano* v. *Department of Hospitals of the City of New York,* 299 F.Supp. 166, 175 (S.D.N.Y. 1969), the Court refused to exercise pendent jurisdiction over a claim turning on the construction of a New York Social Services law on the grounds that the claim "presents a question of state legislative intent and delegation of powers to an administrative body, which more appropriately lies within the ambit of the state court's expertise with respect to its own laws."

noteworthy that the problem of medical malpractice insurance is currently the subject of intense public debate in Rhode Island, and the state government has recently taken major affirmative steps to come to grips with the problems in this area. These factors alone, of course, would not preclude this Court from taking pendent jurisdiction over Counts II, III, and IV, but when they are considered in light of the dismissal of the federal claim, the early stage of this litigation, and the complex questions of state law that are presented, I conclude that it would verge on an abuse of my discretion to exercise pendent jurisdiction in this case.

All four counts of the plaintiffs' amended complaint are hereby dismissed

/s/ RAYMOND J. PETTINE

Chief Judge

Nov. 25, 1975

Appendix C

Amended Complaint

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

C. A. No. 75-0176

David M. Barry, M.D., Leroy S. Chapnick, M.D., Walter C. Cotter, M.D., Paul J. M. Healey, M.D., Anthony F. Merlino, M.D., Paul B. Metcalf, M.D., H. Gerald Rock, M.D., and Rosario V. Tomaselli, M.D.

and

Penny Andrew, Constance V. Boisse, Christopher Daniels, Arthur M. Ferland, Gladys L. Spaight, and Alphonse D. Vitullo

v.

St. Paul Fire & Marine Insurance Co., Aetna Casualty & Surety Co., Travelers Indemity of Rhode Island, Travelers Indemnity Co. of Rhode Island, Travelers Insurance Co., Hartford Casualty Company and Hartford Fire Insurance Co.

AMENDED COMPLAINT

COUNT I

I

JURISDICTION

1. This action arises under the Sherman Anti Trust Act §§1 and 2 (15 U.S.C.A. §§1 and 2) and Clayton Act §§4 and 16 (15 U.S.C.A. §§15 and 26) as hereinafter more fully appears.

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2. The matter in controversy exceeds the sum or value of Ten Thousand Dollars ($10,000.00) exclusive of interest and costs, and arises under the laws of the United States (28 U.S.C.A. §1331).

3. The matter in controversy arises under an act of Congress regulating commerce and protecting trade and commerce against unreasonable restraints and monopolies (28 U.S.C.A. §1337).

II

PARTIES

1. Plaintiffs DAVID M. BARRY, M.D., of Providence, Rhode Island, LEROY S. CHAPNICK, M.D., of North Providence, Rhode Island, WALTER C. COTTER, M.D., of Providence, Rhode Island, PAUL J. M. HEALEY, M.D., of Rumford, Rhode Island, ANTHONY F. MERLINO, M.D., of North Providence, Rhode Island, PAUL B. METCALF, JR., M.D., of Pawtucket, Rhode Island, H. GERALD ROCK, M.D., of Warwick, Rhode Island and ROSARIO V. TOMASELLI, M.D., of Providence, Rhode Island are practicing physicians licensed to practice medicine in the State of Rhode Island, who bring this action on behalf of themselves and all other similarly situated physicians who are licensed to practice in the State of Rhode Island.

2. Plaintiffs PENNY ANDREW of Pawtucket, Rhode Island, CONSTANCE V. BOISSE of Pawtucket, Rhode Island, CHRISTOPHER DANIELS of Pawtucket, Rhode Island, ARTHUR M. FERLAND of Providence, Rhode Island, GLADYS L. SPAIGHT of East Providence, Rhode Island and ALPHONSE

D. VITULLO of Barrington, Rhode Island are citizens of the State of Rhode Island presently under the care of physicians, and who are or may require medical care in the future, who bring this action on behalf of themselves, and all persons presently receiving medical care and attention, or who in the future may require medical care and attention from physicans and medical personnel in the State of Rhode Island.

3. The within action is maintainable as a class action be each of the aforedescribed classes of plaintiffs because:

a. Each class is so numerous that joinder of all its members is not practical.

b. There are questions of law or fact common to each class.

c. The claims of the representative parties are typical of the claims of their respective Classes.

d. The representative parties will fairly and adequately protect the interests of their respective classes.

4. The defendants, St. Paul Fire & Marine Insurance Co., (hereinafter referred to as "St. Paul") and Aetna Casualty & Surety Co., (hereinafter referred to as "Aetna"), are each national corporations licensed to sell insurance in the State of Rhode Island, all of which have been, at all times mentioned herein, and for a long time prior thereto engaged in the business of selling insurance in the State of Rhode Island.

5. The defendants, Travelers Indemnity of Rhode Island, Travelers Indemnity Co. of Rhode Island and Travelers Insurance Co., (hereinafter collectively referred to as "Travelers") are affiliated insurance companies, having common ownership, and are an integral part of a group of corporations doing business nationally and licensed to sell insurance in the State of Rhode Island, which have been, at all times mentioned herein, and for a long time prior thereto engaged in the business of selling insurance in the State of Rhode Island.

6. The defendants, Hartford Casualty Company and Hartford Fire Insurance Co., (hereinafter collectively referred to as "Hartford") are affiliated insurance companies, having common ownership, and are an integral part of a group of corporations doing business nationally and licensed to sell insurance in the State of Rhode Island, which have been, at all times mentioned herein, and for a long time prior thereto engaged in the business of selling insurance in the State of Rhode Island.

III

NATURE OF INTERSTATE COMMERCE

7. Defendants, St. Paul, Aetna, Travelers and Hartford are corporations which presently are and have been for a long time prior hereto, engaged in the business of selling general liability insurance on a national scale, including the sale of such general liability insurance in the state of Rhode Island.

8. The defendants' insurance businesses are not separated into fifty (50) distinct territorial compartments which function in isolation from each other. Inter-relationships, interdependence and integration of activities in all of the states in which they operate are practical aspects of the defendants' methods of doing business.

9. All named defendants are, at the present time, and have, for a long period been, engaged in selling medical malpractice insurance to physicians, hospitals and other medical personnel in the state of Rhode Island and elsewhere throughout the United States within the ordinary conduct of their business. Premiums for this medical malpractice insurance are being, and have been, received from physicians, hospitals and other medical personnel in the state of Rhode Island and are and have been applied by the defendants in various aspects of the operation of their business outside the state of Rhode Island.

10. The defendant corporations own property, pay taxes, insure personnel, firms and corporations and otherwise engage in commerce throughout the United States.

11. Plaintiff physicians and hospitals are engaged in interstate commerce in that they purchase goods and materials from sources located throughout the United States, purchase and sell services from and to residents of other states, give medical education to persons who practice or who go on to practice medicine in various states, and engage in research, development and scientific studies for the advancement of medicine, health services and the cure

and treatment of diseases, and for the health of and to the benefit of persons throughout the United States.

IV

Cause of Action

12. The defendants, St. Paul, Aetna, Travelers, and Hartford over a period of years have so conducted their respective businesses of selling medical malpractice insurance in the State of Rhode Island that they have, at the present time, acquired a total monopoly in the sale of medical malpractice insurance to the end that all physicians, hospitals and other medical personnel buying medical malpractice insurance in the State of Rhode Island buy said insurance from defendants, St. Paul, Aetna, Travelers, and Hartford.

13. In establishing the aforesaid monopoly, the defendant corporations have created a condition whereby all physicians, hospitals and other medical personnel in the State of Rhode Island have come to rely upon said defendants for their medical malpractice insurance.

14. Said defendant corporations, and each of them, for a great number of years have realized large profits from the sale of medical malpractice insurance in the State of Rhode Island.

15. Said defendant corporations and each of them, for a great number of years have realized large profits from the sale of insurance other than medical malpractice in-

surance to persons, firms, and corporations in the State of Rhode Island.

16. Said defendants and each of them, have been permitted to realize said large profits from the sale of medical malpractice and other insurance by virtue of the fact that they have been licensed by the Insurance Commissioner of Rhode Island to sell insurance within the State of Rhode Island.

17. By virtue of the grant of said license to sell insurance in the State of Rhode Island, and by virtue of their creation of a monopoly in the sale of medical malpractice insurance, the defendant corporations, and each of them have obligations to the members of each of the aforementioned plaintiff classes and to the citizens of the State of Rhode Island concomitant with or counterbalancing to the aforesaid licenses and privilege granted them.

18. By virtue of having created the aforesaid monopolies in the sale of medical malpractice insurance, said defendant corporations have caused all physicians, hospitals and other medical personnel as well as all patients and prospective patients and tax payers in the State of Rhode Island to be in a position of vulnerability and total depenence upon the good faith, integrity, and fairness of the defendant corporations.

19. For a long period of years, the plaintiff physicians, hospitals and other medical personnel have become accustomed to renewing their medical malpractice insurance with the defendant companies, and have come to rely on

the fact that such insurance would be renewed, and upon a reasonable price bearing a reasonable relation to economic conditions.

20. The defendants and each of them are, and have been, aware that under the present social and economic conditions, it is virtually impossible for a physician, hospital or other medical personnel to engage in the practice of medicine or provide medical services or treatment without medical malpractice insurance.

21. Defendant St. Paul is the largest single carrier of medical malpractice insurance in the State of Rhode Island, insuring approximately six hundred (600) physicians, and numerous hospitals within the State, all of which is known and has been known to defendants Aetna, Travelers and Hartford.

22. Defendants St. Paul, Aetna, Travelers, and Hartford in the past had established a policy of accepting applications for medical malpractice insurance from any and all qualified physicians, hospitals or other medical personnel within the State.

23. Almost all current medical malpractice insurance policies written by defendant, St. Paul for physicians, hospitals and other medical personnel in the State of Rhode Island bear an expiration date of June 30, 1975, all of which is known, and has been known to defendants Aetna, Travelers and Hartford.

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24. All medical malpractice insurance policies written by defendants, St. Paul, Aetna, Travelers, and Hartford in the State of Rhode Island and elsewhere throughout the United States have always been written on a so called "Occurrence Basis". ("Occurrence-type" insurance covers the insured provider of medical services for every claim that arises or might arise from any act done during the time when the insurance coverage was in force.)

25. Upon information and belief, all medical malpractice insurance written by each insurance carrier throughout the United States has always been written on a so called "Occurrence Basis".

26. Upon information and belief, no medical malpractice insurance has ever been written any where in the United States on a "Claims Made" basis.

27. "Claims Made" insurance purports to insure the medical service provider only on the basis of insuring against those claims which are actually made and filed during the year in which the insurance is in force and effect, without regard as to when the alleged act of malpractice occurred. Thus, a medical service provider would have to buy a minimum of four (4) one-year policies in order to have coverage comparable to an "occurrence-type" policy.

28. On or about April 18, 1975, defendant, St. Paul, notified plaintiff physicians that under no conditions would it renew any of its "occurrence-type" medical malpractice insurance policies then in force and due to expire on June

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30, 1975, but that it would issue to its insured one (1) year medical malpractice policies on a "Claims Made" basis only.

29. In addition, said defendant, St. Paul, has notified certain hospitals insured by it that their medical malpractice insurance then in force and due to expire on June 30, 1975, would not be renewed under any conditions.

30. Upon information and belief, defendants Aetna, Travelers and Hartford, beginning on or about April 18, 1975, and continuing up to and including the present time, conspired with defendant, St. Paul, and engaged in a continuing unlawful combination and conspiracy, unreasonably to deny any medical malpractice insurance coverage on an "Occurrence Basis" to all of the physicians insured with defendant, St. Paul, at said time.

31. Upon information and belief, defendants Aetna, Travelers and Hartford, beginning on or about April 18, 1975, and continuing up to and including the present time, conspired with defendant, St. Paul, and engaged in a continuing unlawful combination and conspiracy, unreasonably to deny any medical malpractice insurance coverage on any basis to certain hospitals insured with defendant, St. Paul, at said time.

32. In furtherance of the aforesaid unlawful combination and conspiracy, defendants, Aetna, Travelers and Hartford have made and carried out the policy of refusing, and have refused from April 18, 1975, to the present time, to accept any applications for medical malpractice insur-

ance of any type from any physicians, hospitals or other medical personnel presently insured by defendant, St. Paul.

33. The aforesaid unlawful combination and conspiracy of said defendants has consisted of a continuing agreement and concert of action among the defendants, the effect of which has been to place the physicans and hospitals and other medical personnel insured by St. Paul in the State of Rhode Island in a dilemma, whereby they can purchase medical malpractice insurance from one insurer only, to wit defendant, St. Paul, and that purchase must be made on terms dictated by the defendant, St. Paul.

34. The aforesaid unlawful combination and conspiracy of said defendants has consisted of a continuing agreement and concert of action the object and result of which has been a stifling of competition in the medical malpractice insurance market in Rhode Island, has given an exclusive monopoly to defendant St. Paul for the sale of medical malpractice insurance over six hundred (600) physicians and numerous hospitals and has, in effect, threatened to deprive said six hundred (600) physicians and numerous hospitals of their right to acquire medical malpractice insurance on a reasonable basis, and thus their right to engage in the practice of medicine and to provide medical services, all for no justifiable business reason.

35. Defendant St. Paul, in concert with defendants, Aetna, Travelers, and Hartford has engaged in a purposeful course of coercion, intimidation, boycott and unfair competition with respect to the sale of medical malpractice insurance in the State of Rhode Island.

V

Damages

36. As a result of the aforesaid actions of the defendants, the physicians of Rhode Island insured by defendant, St. Paul, have been placed in the position where they are unable to obtain medical malpractice insurance on a reasonable basis after June 30, 1975.

37. As a result of the aforesaid actions of the defendants, the physicians of the State of Rhode Island may be forced to withhold medical services and disengage from the practice of medicine, except on an emergency basis, as a result of which the plaintiff patients and prospective patients will be deprived of medical care and treatment; and the health, safety, welfare and lives of the citizens of Rhode Island will become endangered.

38. As a result of the aforesaid actions of the said defendants, if medical services of the physicians are withheld, the hospitals in the State of Rhode Island will encounter grave financial difficulty, and some of them are in danger of becoming insolvent.

39. As a result of the aforesaid actions of the defendants, the plaintiff physicians are being deprived of their right to practice their profession and to earn a living in the State of Rhode Island.

40. The aforesaid unlawful combination and conspiracy has consisted of a continuing agreement and concert of action among the defendant co-conspirators, the substantial terms and objects of which have included:

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a. A collective refusal to deal with and insure on an occurrence basis over six hundred (600) physicians and numerous hospitals presently insured by defendant, St. Paul.

b. Boycott, coercion and intimidation resulting in or tending to result in an unreasonable restraint of or monopoly in, the business of insurance in the State of Rhode Island and unreasonable restraint or interference with the practice of medicine.

c. Unfair discrimination between individuals of the same class in the rates charged for contracts for medical malpractice insurance.

d. A concerted agreement not to compete with each other for medical malpractice insurance clientele in the State of Rhode Island.

e. Horizontal fixing of prices for medical malpractice insurance issued in the State of Rhode Island.

f. Unfair discrimination between individuals of the same class and of essentially the same risk in the amount of premium, policy fees or rates charged for policies of medical malpractice insurance.

41. As a result of the foregoing, the health, welfare and public interest, and in fact, the entire economy of the State of Rhode Island are gravely and seriously threatened.

42. By reason of the foregoing, plaintiff physicians will suffer great losses of revenue, plaintiff hospitals will suffer great loss of profits and plaintiff patients will be forced to

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pay great sums of money in the form of increased rates for hospital and medical care and attention in the future.

WHEREFORE, plaintiffs demand:

1. That a temporary restraining order, a preliminary injunction and a permanent injunction issue out of this court restraining and enjoining the defendants, and each of them, and their agents, servants and employees from acting or to deny, refuse or interfere with the plaintiff physicians and hospitals in the purchase or acquisition of medical malpractice insurance on an "occurrence basis" at reasonable rates, and from acting in concert or combination in this regard.

2. That a temporary restraining order, a preliminary injunction and a permanent injunction issue out of this court restraining and enjoining the defendants, and each of them, and their agents, servants and employees from acting in concert or combination as follows, or having the following objectives:

a. A collective refusal to deal with and insure on an "occurrence basis" all physicians and hospitals presently insured by defendant St. Paul.

b. Boycott, coercion and intimidation resulting in or tending to result in an unreasonable restraint of or monopoly in, the business of insurance in the State of Rhode Island and unreasonable restraint of or interference with the practice of medicine.

c. Unfair discrimination between individuals of the same class in the rates charged for contracts for medical malpractice insurance.

d. A concerted agreement not to compete with each other for medical malpractice insurance clientele in the State of Rhode Island.

e. Horizontal fixing of prices for medical malpractice insurance issued in the state of Rhode Island.

f. Unfair discrimination between individuals of the same class and of essentially the same risk in the amount of premium, policy fees or rates charged for policies of medical malpractice insurance.

3. That a temporary restraining order, a preliminary injunction and a permanent injunction issue out of this court restraining and enjoining the defendants, and each of them, and their agents, servants and employees from acting in concert and combination to coerce, intimidate or compel plaintiffs to act in any given manner with reference to the purchase of medical malpractice insurance, including, without limiting the generality of the foregoing, coercing or compelling any plaintiff physician to purchase medical malpractice insurance solely from defendant St. Paul or any other defendant insurance company.

4. That a temporary restraining order, a preliminary injunction and a permanent injunction issue out of this court restraining and enjoining the defendants, and each of them, and their agents, servants and employees from entering into, adhering to renewing, maintaining or furthering directly or indirectly, any like or similar combinations and conspiracies to restraining trade and commerce in the sale of medical malpractice insurance in the state of Rhode Island as hereinbefore alleged.

5. That this court ascertain the damages suffered by plaintiffs by reason of the unlawful acts of the defendants herein complained of and award judgment in favor of the named plaintiffs, the members of the plaintiff classes and against the defendants, and each of them, for thrice the amount of said damages, costs and a reasonable attorneys' fee.

All to the damage of the plaintiffs in the sum of One Hundred Million Dollars ($100,000,000.00).

COUNT II

I

JURISDICTION

1. Jurisdiction is based upon diversity of citizenship of plaintiffs and defendants under the provisions of (28 U.S.C.A. §1332).

2. The matter in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00) exclusive of interest and costs.

II

PARTIES

1-6. Paragraphs 1 through 6 of Section II of Count I are hereby incorporated by reference.

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III

CAUSE OF ACTION

7. Defendants St. Paul, Aetna, Travelers and Hartford since the inception of their offering medical malpractice insurance in the State of Rhode Island have been obligated and required by law to make certain disclosures of information regarding the operation and finances of their respective businesses, including, without limitation, with respect to the sale of medical malpractice insurance, the collection of premiums therefor, and the payment of claims.

8. On the basis of the aforesaid information furnished by the defendants to the Insurance Commissioner of the State of Rhode Island and to the plaintiffs, premium rates for medical malpractice insurance have been established.

9. On the basis of the aforesaid information furnished by said defendants, plaintiff physicians have, at all times herein mentioned, been paying premiums for medical malpractice insurance to said defendant companies.

10. Plaintiffs allege that defendants, and each of them, in violation of their obligations to plaintiffs and to the general public, fraudulently and deceitfully:

a. Failed to disclose material facts to the plaintiffs, the general public and the Insurance Commissioner of the State of Rhode Island.

b. Actively concealed material facts from the plaintiffs, the general public, and the Insurance Commissioner of the State of Rhode Island.

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c. Furnished false information to the plaintiffs, to the general public and to the Insurance Commissioner of the State of Rhode Island.

d. Made material misrepresentations to the plaintiffs, to the general public and to the Insurance Commissioner of the State of Rhode Island.

11. Plaintiffs allege that defendants, and each of them, during the course of contract negotiations with plaintiff physicians for the purchase and sale of medical malpractice insurance for sale in the State of Rhode Island, fraudulently and deceitfully:

a. Failed to disclose material facts.

b. Actively concealed material facts.

c. Furnished false information.

d. Made material misrepresentations.

12. At all times herein mentioned, defendants, and each of them, knew or should have known of the falsity and misleading nature of the aforesaid information and misrepresentations.

13. Defendants, and each of them, made said false disclosure, concealed said information, and made said misrepresentations with the intent that the plaintiffs, the general public and the Insurance Commissioner of the State of Rhode Island be deceived thereby and rely thereon.

14. The plaintiffs at all times herein mentioned, have been unable to acquire the correct information concerning

such material facts, and until the filing of the within Complaint, have been ignorant of the true nature thereof.

15. Plaintiffs have at all times herein mentioned, relied on the aforesaid false information, and misrepresentations to their detriment.

16. As a direct result thereof, plaintiff physicians have, at all times herein mentioned, purchased medical malpractice insurance at premiums far in excess of the fair and justifiable rate which should have been charged them in accordance with current market conditions and the law.

17. As a direct result thereof, plaintiff patients have, at all times herein mentioned, been required to pay charges for medical treatment and hospitalization far in excess of fair and justifiable charges in accordance with the current market conditions, said excess charges being directly attributable to the unreasonably high premiums for medical malpractice insurance charged physicians and hospitals by said defendants as described herein.

WHEREFORE:

a. Plaintiff physicians demand that the defendants, and each of them, be ordered to make restitution to them of all premiums charged them in excess of the fair and justifiable rate which should have been charged from the inception of the offering and sale of medical malpractice insurance in the State of Rhode Island by the defendants to them.

b. Plaintiff patients demand that defendants, and each of them, be ordered to make full restitution to

them for all charges for medical attention and hospital care paid by them in excess of the fair and justifiable charges which should have been made, since the inception of the offering and sale of medical malpractice insurance by the defendants to physicians and hospitals in the State of Rhode Island.

c. Plaintiff physicians and patients demand that defendants, and each of them, be ordered to pay counsel fees, compensatory and punative damages in such sums as the court shall determine fair and justifiable.

COUNT III

I

JURISDICTION

1. Section I, Paragraphs 1 and 2 of Count II are hereby incorporated by reference.

II

PARTIES

1-6. Paragraphs 1 through 6 of Section II of Count I are hereby incorporated by reference.

III

CAUSE OF ACTION

7-13. Paragraphs 7 through 13 of Section III of Count II are hereby incorporated by reference.

14. After making said false misrepresentations and disclosures, and fraudulently concealing said information, defendant St. Paul, announced that it would refuse to renew any of its policies of medical malpractice insurance for physicians commencing July 1, 1975 on any basis other than "claims-made", which they knew, or should have known, would be totally unacceptable to all their insured physicians.

15. Defendants, Aetna, Travelers and Hartford, at the same time, and thereafter, refused to offer medical malpractice insurance to any of defendant St. Paul's customers under any conditions whatsoever, thereby putting some six hundred (600) plaintiff physicians in a dilemma, wherein they could purchase medical malpractice insurance from St. Paul only, and then under conditions dictated by St. Paul; to wit, a "claims-made" basis.

16. The actions of defendants, and each of them, complained of in Counts I, II and III hereof, created a situation in the State of Rhode Island whereby the Governor, in order to provide medical malpractice insurance for physicians and assure the availability of health services to the citizens of the State of Rhode Island, including, but not limited to the class of plaintiff patients, was obligated to establish a joint underwriting association through which all physicians in the State of Rhode Island are obligated by law to purchase their medical malpractice insurance.

17. Upon information and belief, the rates for said medical malpractice insurance under said joint under-

writing authority will be substantially in excess of the rates previously paid by plaintiff physicians and of the rates which should have been paid by plaintiff physicians in the absence of misrepresentations, fraudulent conduct and other acts of defendants as complained of in Counts I, II, and III.

18. As a direct result thereof, plaintiff patients will be forced to incur expenses for medical services and hospitalization far in excess of what they should be charged in the absence of misrepresentations, fraudulent conduct and other acts of defendants as complained of in Counts I, II, and III.

WHEREFORE, plaintiff physicians and plaintiff patients demand that damages be assessed against the defendants, and each of them, to include compensatory damages, punitive damages and reasonable attorneys fees.

COUNT IV

I

JURISDICTION

1. Section I, Paragraphs 1 and 2 of Count II are hereby incorporated by reference.

II

PARTIES

1-6. Paragraphs 1 through 6 of Section II of Count I are hereby incorporated by reference.

Appendix C

III

CAUSE OF ACTION

7-15. Paragraphs 7 through 15 of Section III of Count II are hereby incorporated by reference.

16. The defendants, and each of them, misled plaintiff physicians into believing that medical malpractice insurance was not obtainable in the State of Rhode Island at the maximum rates established by the Insurance Commissioner of the State of Rhode Island, and fraudulently and deceitfully coerced certain of plaintiff physicians into purchasing medical malpractice insurance from said defendants at rates in excess of the maximum rates established by the Insurance Commissioner of the State of Rhode Island. In furtherance of such fraudulent scheme, defendants require that the plaintiff physicians purchasing said insurance at rates in excess of the maximum rates established by the Insurance Commissioner of the State of Rhode Island, sign a so-called "waiver form" devised and provided by defendants wherein the purchaser purports to represent to the selling insurance company that the insurance coverage that he desires to purchase is unavailable in the State of Rhode Island at rates at the maximum rate established by the Insurance Commissioner, and the purchaser therefore requests that the insurance company sell him such coverage at rates in excess of the maximum so established.

17. As a direct result thereof, defendants have sold to some of plaintiff physicians medical malpractice insurance at rates in excess of the maximum rates established

Appendix C

by the Insurance Commissioner of the State of Rhode Island, in contravention of the laws of the State of Rhode Island.

18. The defendants, and each of them, have, by coercion, intimidation, fraud, deceit and other actions complained of, supra, forced plaintiff physicians to enter into unconscionable contracts of insurance, in violation of the law and public policy.

19. As a direct result thereof, plaintiff physicians have been forced to expend unjustified and exhorbitant amounts for the purchase of medical malpractice insurance.

20. As a direct result thereof, patients have been, and will in the future be required to pay charges for medical treatment and hospitalization far in excess of the fair and justifiable charges in accordance with the then current market conditions.

WHEREFORE, plaintiff physicians and plaintiff patients demand that damages be assessed against the defendants, and each of them, to include compensatory damages, punitive damages and reasonable attorneys fees.

All to the damage of the plaintiffs in the sum of One Hundred Million Dollars ($100,000,000.00).

By their Attorney:

/s/ LEONARD DECOF

LEONARD DECOF
Leonard Decof, Ltd.
111 Wayland Avenue
Providence, Rhode Island 02906

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-240

ST. PAUL FIRE & MARINE INSURANCE COMPANY, *et al.*, *Petitioners,*

v.

DAVID M. BARRY, *et al.*, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

AMICI CURIAE BRIEF OF THE AMERICAN INSURANCE ASSOCIATION, THE ALLIANCE OF AMERICAN INSURERS AND THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

RICHARD A. WHITING
LOREN KIEVE
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Amicus Curiae
The American Insurance Association

FRED W. BECK
20 North Wacker Drive
Chicago, Illinois 60606

Attorney for Amicus Curiae
The Alliance of American Insurers

PAUL C. BLUME
2600 River Road
Des Plaines, Illinois 60018

Attorney for Amicus Curiae
National Association of Independent Insurers

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AMICI CURIAE BRIEF OF THE AMERICAN INSURANCE ASSOCIATION, THE ALLIANCE OF AMERICAN INSURERS AND THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The American Insurance Association, the Alliance of American Insurers and the National Association of Independent Insurers, with the consent of all parties, file this brief as *amici curiae* in support of a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

THE INTEREST OF THE AMICI CURIAE

The American Insurance Association ("AIA") is a voluntary trade association of approximately 145 stock insurance companies (a list of which is appended hereto as Appendix A). The Alliance of American Insurers ("Alliance") is a voluntary trade association of approximately 100 mutual insurance companies (a list of which is appended hereto as Appendix B). The National Association of Independent Insurers ("NAII") is a voluntary trade association of over 400 insurance companies (a list of which is appended hereto as Appendix C). Together, these companies write a significant portion of the property and casualty insurance policies issued in the United States. A number of the member companies of these associations write medical malpractice insurance, the subject of this suit. These companies are directly affected by the First Circuit's judgment, which renders them potentially liable for treble damages in policyholder suits brought under the federal antitrust laws.

The First Circuit's ruling, moreover, would remove the antitrust exemption from policyholders' actions attacking any form of coverage and any type of policy, including all of those written by the members of AIA, NAII and the Alliance. By exposing them to antitrust liability notwithstanding the contrary decisions of other Courts of Appeals, an express Congressional grant of antitrust immunity and intensive state regulation of insurance, the decision of the First Circuit subjects all AIA, NAII and Alliance members to serious uncertainties about the conditions under which coverages and policies can or must be made available.

QUESTION PRESENTED

The McCarran-Ferguson Act, §§ 1, 2, 3(b), 59 Stat. 34 (1945), 15 U.S.C. §§ 1011, 1012, 1013(b) (1970) (hereinafter "McCarran Act"), provides in pertinent part that the federal antitrust laws are not applicable to the "business of insurance" when regulated by state law—except, as provided in § 3(b) of that Act, in cases of "boycott, coercion and intimidation." The question which these *amici* believe is presented is:

> Whether the McCarran Act's "boycott exception" extends to an alleged boycott of policyholders by companies admittedly engaged in the business of insurance and regulated by state law.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is In Direct Conflict With Those of the Fifth and Ninth Circuit Courts of Appeals Which Have Construed the Boycott Exception to Preclude Policyholder Suits

The plaintiffs, medical doctors and other individuals purporting to represent a class of Rhode Island physicians and a class of their present or prospective patients, respectively, filed this action in the district court alleging, *inter alia*, that the plaintiff physicians had been "boycotted" by the defendants, insurance companies providing medical malpractice insurance in the State of Rhode Island. According to the complaint, the plaintiff doctors had previously purchased malpractice insurance from one of the defendants, which insurance provided coverage on an "occurrence" basis, *i.e.*, the policy covered the period during which the alleged malpractice occurred. Complaint, Count I, ¶¶ 19, 24 (Appendix C to the Petition, at A-44a-46a). Thus, if a doctor had in force a policy providing coverage

during 1970 and committed an act constituting malpractice during that year, the policy would still provide coverage even if the doctor discontinued his insurance in 1971 and a claim was made in 1971 or thereafter. The complaint alleged that upon expiration of those policies, the only type of coverage the doctors were able to obtain was from the same insurer and then only on a "claims made" basis, *i.e.*, the policy covered the period during which a claim was made, so that coverage would be provided even though the act constituting malpractice occurred at a time prior to the date when the coverage became effective. Coverage, however, would not be provided if the act occurred during the policy year but the claim was made in a subsequent year. Complaint, Count I, ¶¶ 27, 28 and 30 (Appendix C to the Petition, at A-46a-47a).

The Court below held that these allegations were sufficient to trigger the McCarran Act's boycott exception and therefore remove the antitrust immunity otherwise conferred by the Act. In reviewing the prior decisions of other circuits and the district courts construing the exception, the First Circuit's majority admits that it was "compelled to disagree with this rather formidable array of authorities," including the contrary decisions of the Fifth and Ninth Circuits. (Appendix A to the Petition ("App. A"), at 6a.) Indeed, the novelty of the majority's ruling is underscored by the fact that it could cite *no* previous decision which construed the boycott exception to permit policyholder suits against insurance companies under the federal antitrust laws.

Unlike the First Circuit, which made the boycott exception available to all antitrust plaintiffs, the Fifth and Ninth Circuits have interpreted it to include only boycotts aimed at those engaged in the "business of

insurance," that is, insurance companies and their agents. In *Addrisi* v. *Equitable Life Assurance Society of the U.S.*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975), the Ninth Circuit affirmed the district court's dismissal of the complaint for failure to state a claim against the plaintiff's contention that the required purchase of a "credit" insurance policy in conjunction with receiving a loan was an act of "boycott" or "coercion" depriving the alleged "tie-in" of an antitrust exemption. The court rejected this argument, explaining that:

> . . . it is evident from an examination of the legislative history behind § 1013(b) that the intent of Congress was to reserve unto the reach of the Sherman Act only a narrow area of restraint of trade activity among those in the business of insurance, namely, antitrust acts among insurance companies and agents for the purpose of boycott or coercion *among insurance companies and agents.* [503 F.2d at 728-729 (emphasis added).]

The Fifth Circuit, in *Meicler* v. *Aetna Casualty and Surety Co.*, 506 F.2d 732 (5th Cir. 1975), came to the same conclusion in determining that the "boycott exception" was not applicable to the sale of automobile insurance at state-regulated rates set in accordance with a driver risk classification plan.

Barring antitrust actions by insureds against insurers has been deemed necessary to effectuate the primary purpose of the McCarran Act—federal deference to state regulation of insurance. The Ninth Circuit concluded in *Addrisi* that permitting policyholder antitrust actions would:

> . . . vitiate the McCarran-Ferguson Act in its concept of setting over unto the several states the regu-

lation and protection of the insurer-insured relationship. [503 F.2d at 729 (citations omitted).]

In the *Meicler* decision, the Fifth Circuit similarly emphasized that such a "broad construction of Section 1013(b) would emasculate the antitrust exemption contained in Section 1012(b) of the McCarran-Ferguson Act." 506 F.2d at 734.

II. The Decision Below Directly Conflicts With the States' Power—As Congressionally Mandated by the McCarran Act—To Regulate the Business of Insurance

The State of Rhode Island—as do virtually all of the states—exercises pervasive regulatory control over the business of insurance, including medical malpractice insurance. In particular, both the availability of malpractice insurance and the type of coverage afforded by the policies in question is regulated by the State. (App. A, at 4a. *See also* App. A, at 22a (dissenting opinion of Campbell, J.).) The complaint, moreover, acknowledges that Rhode Island's Commissioner of Insurance establishes premium rates for malpractice insurance, based upon the type and scope of coverage. Complaint, Count II, ¶¶ 7-9 (Appendix C to the Petition, at 55a). Malpractice insurance rates, like other insurance rates, are derived from an elaborate state-by-state statistical analysis of loss experience and projected losses for the particular risk or risks insured against. Indeed, in the business of insurance and in its regulation by the states, questions of coverages, rates and availability are functionally inseparable since all evolve from an analysis and classification of risks.[1]

[1] Because of this interdependency, the Court of Appeals' holding on the "boycott exception" cannot be reconciled with its approval of the district court's abstaining from a consideration of plaintiffs' state-law claim for restitution of all amounts paid in excess of a "fair and reasonable" malpractice insurance rate—in order to avoid the "risk [of] interfering with the states' regulatory scheme or misinterpreting state law." (App. A, at 19a.)

As this Court stressed in *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969), the purpose of the McCarran Act is to suspend application of the federal antitrust laws in favor of "the type of state regulation that centers around the contract of insurance," precisely the form of regulation adopted by Rhode Island to deal with medical malpractice insurance rates, availability and coverage. The "core of the 'business of insurance'" which, the Court said, is to be left to state regulation is

> . . . The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement . . . [393 U.S. at 460.]

Despite this, the court below held that the plaintiff doctors are not barred by the boycott exception from seeking to recover treble damages for an alleged "boycott" by the insurance company defendants solely because of a claimed refusal to provide the insurance or type of coverage which plaintiffs desired—notwithstanding state regulation. If such a departure from precedent is to take place, it should only be after plenary consideration by this Court.

If, as is the case here, the state has exercised its regulatory authority, it is difficult to envision a more direct impairment of the ability of the state effectively to regulate the business of insurance and "the relationship between the insurance company and the policyholder" than having insurers subjected to contradic-

tory "regulation" through the processes of *ad hoc* antitrust litigation at the instance of disgruntled policyholders.

Instead of state regulation through such administrative procedures as approval of rates and policy provisions and investigation of complaints of unfair practices,[2] the already overburdened federal courts will be placed in the position of passing upon the efficacy and propriety of the minutiae of state insurance regulation. This is a task for which judges and juries are ill-suited and flies in the face of the congressional declaration that "the continued regulation . . . by the several States . . . is in the public interest." McCarran Act § 1, 15 U.S.C. § 1011.

If plaintiff physicians can successfully call into question state-regulated insurance practices by the simple expedient of alleging a "boycott," then any other policyholder or even a prospective policyholder may assert that he, too, has been "boycotted" by not being able to obtain the insurance—including specific terms and conditions of coverage—that he desires. Thus, it is not difficult to envision a high-risk driver complaining in federal court that he, too, has been "boycotted" by being placed in an assigned high-risk pool or by being required to pay a higher premium, *cf., e.g., Meicler* v. *Aetna Casualty and Surety Co.*, 373 F. Supp. 509 (S.D. Tex. 1974), *affirmed*, 506 F.2d 732 (5th

[2] Rhode Island's insurance statutes specifically recite that they were enacted "in accordance with the intent of Congress as expressed in" the McCarran Act, R.I. Gen. Laws § 27-29-1, and further provide for public hearings, appropriate orders and judicial review and enforcement of such orders upon any claim of a violation of the State's insurance laws, including claims by policyholders or those who allege they were denied coverage. R.I. Gen. Laws §§ 27-29-5 through 27-29-9.

Cir. 1975); or a sky-diver alleging that he has been "boycotted" or "coerced" because he is unable to obtain life or accident insurance or is only able to do so by paying a higher premium; or a consumer alleging that he has been "boycotted" because health or medical insurers will not provide him with dental services as part of a general health-care plan or have only provided certain pregnancy benefits to his wife—despite state regulation of each of these matters.[3]

If the delicate balance of state regulation of the business of insurance [4] is to be subjected to the scrutiny of the antitrust laws generally, it should only be after statutory revision by Congress, which has previously determined that it is in the public interest to leave such regulation to the states, or upon appropriate consideration and a decision by this Court.

[3] At least two federal courts have explicitly rejected the type of claims made by respondents in this case. In Pastor v. Hartford Fire Ins. Co., 1976-1 CCH Trade Cas. ¶ 60,783 (C.D. Cal. 1976) (appeal pending, 9th Cir.), the court held that allegations of coercion, intimidation and boycott on the part of physicians concerning medical malpractice insurance failed to state a claim upon which relief can be granted since the alleged "boycott" was not within the proper ambit of the McCarran Act's boycott exception. And in Pierucci v. Continental Casualty Co., 1976-2 CCH Trade Cas. ¶ 61,110 (W.D. Pa. 1976), the court held that allegations of a "boycott" by insurance companies which would only provide architect's liability insurance on a "claims made" basis should properly be made to the state Insurance Commissioner.

[4] The State of Rhode Island had already enacted regulations establishing a joint underwriting association to provide medical malpractice insurance and requiring all insurers authorized to write personal liability coverages in the state to participate in the association. (App. A, at A-3, n. 2; Appendix B to Petition, at 30, n. 2). The nationwide efforts to come to grips with this issue by the appropriate state agencies are matters of public record.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD A. WHITING
LOREN KIEVE
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Amicus Curiae
The American Insurance Association

FRED W. BECK
20 North Wacker Drive
Chicago, Illinois 60606

Attorney for Amicus Curiae
The Alliance of American Insurers

PAUL C. BLUME
2600 River Road
Des Plaines, Illinois 60018

Attorney for Amicus Curiae
National Association of Independent Insurers

APPENDIX

APPENDIX A

AMERICAN INSURANCE ASSOCIATION
MEMBER COMPANIES

Admiral Insurance Company
Hartford, Connecticut

AEtna Casualty and Surety Company, The
Hartford, Connecticut

AEtna Casualty and Surety Company of Illinois, The
Chicago, Illinois

Aetna Fire Underwriters Insurance Company
Hartford, Connecticut

Aetna Insurance Company
Hartford, Connecticut

Aetna Insurance Company of the Midwest
Indianapolis, Indiana

Alaska Insurance Co., The
Anchorage, Alaska

Alaska Pacific Assurance Company
Anchorage, Alaska

Albany Insurance Company
New York, New York

Alliance Assurance Company, Ltd.
New York, New York

Allied Insurance Company
Los Angeles, California

American Automobile Insurance Company
Newark, New Jersey

American Employers' Insurance Company
Boston, Massachusetts

American Fidelity Company
Manchester, New Hampshire

American Foreign Insurance Company
New York, New York

American General Fire & Casualty
Houston, Texas

American General Insurance Company
Houston, Texas

American Insurance Company, The
Newark, New Jersey

Associated Indemnity Corporation
San Francisco, California

Assurance Company of America
New York, New York

Atlas Assurance Company, Ltd.
New York, New York

Automobile Insurance Company of Hartford, Connecticut, The
Hartford, Connecticut

Bituminous Casualty Corporation
Rock Island, Illinois

Bituminous Fire and Marine Insurance Company
Rock Island, Illinois

Blue Ridge Insurance Company
Baltimore, Maryland

British America Assurance Company, The
Toronto, Ontario

Camden Fire Insurance Association, The
Philadelphia, Pennsylvania

Century Indemnity Company
Hartford, Connecticut

Charter Oak Fire Insurance Company
Hartford, Connecticut

City Insurance Company
New York, New York

Colonial Penn Franklin Insurance Company
Philadelphia, Pennsylvania

Colonial Penn Insurance Company
Philadelphia, Pennsylvania

Commercial Union Insurance Company
Boston, Massachusetts

Connecticut Indemnity Company, The
Hartford, Connecticut

Eagle Star Insurance Company Limited
New York, New York

Employers' Fire Insurance Company, The
Boston, Massachusetts

Employers' Surplus Lines Insurance Company
Boston, Massachusetts

Equitable General Insurance Company
Fort Worth, Texas

Excelsior Insurance Company of New York
Syracuse, New York

Farmers Fire Insurance Company, The
York, Pennsylvania

Federal Insurance Company
New York, New York

Fidelity & Deposit Company of Maryland
Baltimore, Maryland

Fidelity and Guaranty Insurance Underwriters, Inc.
Baltimore, Maryland

Fire and Casualty Insurance Company of Connecticut, The
Hartford, Connecticut

Fireman's Fund Insurance Company
San Francisco, California

Fireman's Fund Insurance Company of Texas
San Francisco, California

First State Insurance Company
Boston, Massachusetts

General Accident Fire and Life Assurance Corporation, Ltd.
Philadelphia, Pennsylvania

Globe Indemnity Company
New York, New York

Granite State Insurance Company
Manchester, New Hampshire

Great Northern Insurance Company
Minneapolis, Minnesota

Gulf American Fire and Casualty Company
Montgomery, Alabama

Hartford Accident and Indemnity Company
Hartford, Connecticut

Hartford Casualty Insurance Company
Hartford, Connecticut

Hartford Fire Insurance Company
Hartford, Connecticut

Hartford Steam Boiler Inspection and Insurance Company, The
Hartford, Connecticut

HOME Indemnity Company, The
New York, New York

HOME Insurance Company, The
Manchester, New Hampshire

HOME Insurance Company of Illinois, The
Chicago, Illinois

HOME Insurance Company of Indiana, The
Indianapolis, Indiana

Home Owners Insurance Company
Hato Rey, Puerto Rico

Houston General Insurance Company
Fort Worth, Texas

Houston General Lloyds
Fort Worth, Texas

Illinois Insurance Company
Chicago, Illinois

Illinois National Insurance Company
Springfield, Illinois

Industrial Indemnity Company
San Francisco, California

Industrial Insurance Company
San Francisco, California

Industrial Insurance Company of Hawaii, Ltd.
Honolulu, Hawaii

Industrial Underwriters Insurance Company
Dallas, Texas

Inland National Insurance Company
Springfield, Illinois

Insurors Indemnity and Insurance Company
Oklahoma City, Oklahoma

INA Insurance Company of Ohio
Lakewood, Ohio

INA of Texas
Los Angeles, California

Insurance Company of North America
Philadelphia, Pennsylvania

International Insurance Company
New York, New York

Jefferson-Pilot Fire and Casualty Company
Greensboro, North Carolina

London Assurance, The
New York, New York

Maine Bonding & Casualty Company
Portland, Maine

Maryland Casualty Company
Baltimore, Maryland

Metropolitan Fire Assurance Company
Hartford, Connecticut

Millers National Insurance Company
Chicago, Illinois

Monarch Insurance Company of Ohio, The
New York, New York

National Standard Insurance Company
Houston, Texas

National Surety Corporation
Chicago, Illinois

National Surety Corporation of California
San Francisco, California

Newark Insurance Company
New York, New York

New England Reinsurance Corporation
Boston, Massachusetts

New Hampshire Indemnity Company
Manchester, New Hampshire

New Hampshire Insurance Company
Manchester, New Hampshire

New York Underwriters Insurance Company
New York, New York

North River Insurance Company, The
New York, New York

Northern Assurance Company of America, The
Boston, Massachusetts

Northern Insurance Company of New York
Baltimore, Maryland

Northwestern Pacific Indemnity Company
Portland, Oregon

Pacific Employers Insurance Company
Los Angeles, California

Pacific Indemnity Company
Los Angeles, California

Pacific Insurance Company, Limited
Honolulu, Hawaii

Pennsylvania General Insurance Company
Philadelphia, Pennsylvania

Phoenix Insurance Company, The
Hartford, Connecticut

Planet Insurance Company
Philadelphia, Pennsylvania

Potomac Insurance Company
Philadelphia, Pennsylvania

Provident General Insurance Company
Chattanooga, Tennessee

Reliance Insurance Company
Philadelphia, Pennsylvania

Reliance Insurance Company of Illinois
Chicago, Illinois

Republic Insurance Company
Dallas, Texas

Republic Underwriters Insurance Company
Oklahoma City, Oklahoma

Republic-Vanguard Insurance Company
Oak Park, Illinois

Royal Globe Insurance Company
Chicago, Illinois

Royal Indemnity Company
New York, New York

Safeguard Insurance Company
New York, New York

St. Paul Fire and Marine Insurance Company
St. Paul, Minnesota

St. Paul Guardian Insurance Company
St. Paul, Minnesota

St. Paul Insurance Company of Illinois, The
Chicago, Illinois

St. Paul Insurance Company of Texas, The
Houston, Texas

St. Paul Mercury Insurance Company
St. Paul, Minnesota

Sea Insurance Company, Ltd., The
New York, New York

Seaboard Surety Company
New York, New York

Security Insurance Company of Hartford
Hartford, Connecticut

Select Way Insurance Company
Branchville, New Jersey

Selected Risks Insurance Company
Branchville, New Jersey

Sentinel Insurance Company, Limited
Honolulu, Hawaii

Southern Fire & Casualty Company
Knoxville, Tennessee

Standard Fire Insurance Company, The
Hartford, Connecticut

Sumitomo Marine & Fire Insurance Company, Ltd., The
New York, New York

Sun Insurance Office, Limited
New York, New York

Texas Pacific Indemnity Company
Dallas, Texas

Traders Indemnity Company
Fort Worth, Texas

Travelers Indemnity Company, The
Hartford, Connecticut

Travelers Indemnity Company of America, The
Hartford, Connecticut

Travelers Indemnity Company of Illinois, The
Chicago, Illinois

Travelers Indemnity Company of Rhode Island, The
Hartford, Connecticut

Travelers Insurance Company, The
Hartford, Connecticut

Twin City Fire Insurance Company
Hartford, Connecticut

United Pacific Insurance Company
Tacoma, Washington

United States Fidelity and Guaranty Company
Baltimore, Maryland

United States Fire Insurance Company
New York, New York

Vanguard Insurance Company
Dallas, Texas

Vanguard Underwriters Insurance Company
Oklahoma City, Oklahoma

Vigilant Insurance Company
New York, New York

Westchester Fire Insurance Company
New York, New York

Western Assurance Company, The
Toronto, Ontario

Western Casualty and Surety Company, The
Fort Scott, Kansas

Western Fire Insurance Company, The
Fort Scott, Kansas

Western Indemnity Company, Inc., The
Fort Scott, Kansas

APPENDIX B

THE ALLIANCE OF AMERICAN INSURERS
MEMBER COMPANIES

Abington Mutual Fire Insurance Company
Abington, Massachusetts

Amalgamated Casualty Insurance Company
Washington, D.C.

American Hardware Mutual Insurance Company
Minneapolis, Minnesota

American Manufacturers Mutual Insurance Company
Long Grove, Illinois

American Mutual Insurance Company of Boston
Wakefield, Massachusetts

American Mutual Liability Insurance Company
Wakefield, Massachusetts

American Mutual Reinsurance Company
Chicago, Illinois

Amica Mutual Insurance Company
Providence, Rhode Island

Atlantic Mutual Fire Insurance Company of Savannah
Savannah, Georgia

Attleboro Mutual Fire Insurance Company
Attleboro, Massachusetts

Austin Mutual Insurance Company
Minneapolis, Minnesota

Bakers Mutual Insurance Company of New York
Lynbrook, New York

Barnstable County Mutual Fire Insurance Company
Yarmouth Port, Massachusetts

Brethren Mutual Insurance Company
Hagerstown, Maryland

California Mutual Insurance Company
Monterey, California

Central Mutual Insurance Company
Van Wert, Ohio

Chicago Mutual Liability Company
Chicago, Illinois

Church Mutual Insurance Company
Merrill, Wisconsin

Cincinnati Equitable Insurance Company
Cincinnati, Ohio

Citizens Mutual Insurance Company
Janesville, Wisconsin

Citizens Security Mutual Insurance Company
Red Wing, Minnesota

Dorchester Mutual Fire Insurance Company
Boston, Massachusetts

Druggists Mutual Insurance Company
Algona, Iowa

Employers Mutual Casualty Company
Des Moines, Iowa

Employers Mutual Liability Insurance Company
Wausau, Wisconsin

Farmers Alliance Mutual Insurance Company
McPherson, Kansas

Federated Mutual Insurance Company
Owatonna, Minnesota

Fitchburg Mutual Fire Insurance Company
Fitchburg, Massachusetts

Florists' Mutual Insurance Company
Edwardsville, Illinois

Grain Dealers Mutual Insurance Company
Indianapolis, Indiana

Granite Mutual Insurance Company
Barre, Vermont

The Hamilton Mutual Insurance Company of Cincinnati, Ohio
Cincinnati, Ohio

Hingham Mutual Fire Insurance Company
Hingham, Massachusetts

Holyoke Mutual Insurance Company in Salem
Salem, Massachusetts

Ideal Mutual Insurance Company
New York, New York

IMT Insurance Company (Mutual)
Des Moines, Iowa

Indiana Farmers Mutual Insurance Company
Indianapolis, Indiana

Indiana Lumbermens Mutual Insurance Company
Indianapolis, Indiana

Indiana Union Mutual Insurance Company
Carmel, Indiana

Interboro Mutual Indemnity Insurance Company
Mineola, New York

Iowa Kemper Insurance Company
Mason City, Iowa

Iowa National Mutual Insurance Company
Cedar Rapids, Iowa

Jewelers Mutual Insurance Company
Neenah, Wisconsin

Liberty Mutual Fire Insurance Company
Boston, Massachusetts

Liberty Mutual Insurance Company
Boston, Massachusetts

Lumber Mutual Insurance Company
Wellesley, Massachusetts

Lumbermens Mutual Casualty Company
Long Grove, Illinois

The Lumbermens Mutual Insurance Company
Mansfield, Ohio

Lutheran Mutual Fire Insurance Company
Oak Park, Illinois

Merchants and Business Men's Mutual Insurance Company
Harrisburg, Pennsylvania

Merrimack Mutual Fire Insurance Company
Andover, Massachusetts

Metropolitan Property and Liability Insurance Company
Warwick, Rhode Island

Michigan Millers Mutual Insurance Company
Lansing, Michigan

Michigan Mutual Insurance Company
Detroit, Michigan

Middlesex Insurance Company
Concord, Massachusetts

Middlesex Mutual Assurance Company
Middletown, Connecticut

Millers Mutual Insurance Association of Illinois
Alton, Illinois

Minnesota Mutual Fire and Casualty Company
Minneapolis, Minnesota

Montgomery Mutual Insurance Company
Sandy Spring, Maryland

Mountain States Mutual Casualty Company
Albuquerque, New Mexico

Municipal Mutual Insurance Company of West Virginia
Wellsburg, West Virginia

Mutual Assurance Company for Insuring Houses from Loss by Fire
Philadelphia, Pennsylvania

National Grange Mutual Insurance Company
Keene, New Hampshire

New Castle Mutual Insurance Company
Wilmington, Delaware

New Jersey Manufacturers Insurance Company
Trenton, New Jersey

Norfolk and Dedham Mutual Fire Insurance Company
Dedham, Massachusetts

Pennsylvania Lumbermens Mutual Insurance Company
Philadelphia, Pennsylvania

Pennsylvania Millers Mutual Insurance Company
Wilkes-Barre, Pennsylvania

Patrons Mutual Insurance Association
Alathe, Kansas

The Philadelphia Contributionship for the Insurance of Houses from Loss by Fire
Philadelphia, Pennsylvania

Preferred Mutual Insurance Company
New Berlin, New York

Prudential Property and Casualty Insurance Company
Holmdel, New Jersey

Retail Lumbermens Mutual Insurance Company of Wisconsin
Milwaukee, Wisconsin

Safety Mutual Casualty Corporation
St. Louis, Missouri

Security Mutual Casualty Company
Chicago, Illinois

Sentry Insurance and Mutual Company
Stevens Point, Wisconsin

The Shelby Mutual Insurance Company of Shelby, Ohio
Shelby, Ohio

Texas Employers' Insurance Association
Dallas, Texas

Town and Country Mutual Insurance Company
Indianapolis, Indiana

Tri-State Insurance Company of Minnesota
Luverne, Minnesota

Union Mutual Insurance Company of Providence
Warwick, Rhode Island

Utica Fire Insurance Company of Oneida County, New York
Utica, New York

Utica Mutual Insurance Company
Utica, New York

Utilities Mutual Insurance Company
New York, New York

Waseca Mutual Insurance Company
Waseca, Minnesota

Western National Mutual Insurance Company
Minneapolis, Minnesota

Wisconsin Mutual Insurance Company
Madison, Wisconsin

ASSOCIATE MEMBER COMPANIES

Farmers Mutual Fire Association of West Virginia
Fairmont, West Virginia

Industries Mutual Insurance Company
Omaha, Nebraska

The Ohio Hardware Mutual Insurance Company
Mansfield, Ohio

Pennsylvania National Mutual Casualty Insurance Company
Harrisburg, Pennsylvania

Wayne Mutual Insurance Company
Wooster, Ohio

Landmark American Insurance Company
Oklahoma City, Oklahoma

APPENDIX C

NATIONAL ASSOCIATION OF INDEPENDENT INSURERS
MEMBER COMPANIES

Agricultural Workers Mut. Auto. Ins. Co.
Fort Worth, Texas

Agsecurity Insurance Company
Oklahoma City, Oklahoma

Agway Insurance Company
Syracuse, New York

Aid Insurance Company (Mutual)
Des Moines, Iowa

Alabama Farm Bureau Mut. Ins. Co.
Montgomery, Alabama

Alabama Farm Bur. Mut. Ins. Service, Inc.
Montgomery, Alabama

Alabama Rural Fire Insurance Company
Montgomery, Alabama

Allied Fidelity Insurance Company
Indianapolis, Indiana

Allstate Fire Insurance Company
Northbrook, Illinois

Allstate Indemnity Company
Northbrook, Illinois

Allstate Insurance Company
Northbrook, Illinois

American Agricultural Ins. Co.
Park Ridge, Illinois

American Bankers Ins. Co. of Florida
Miami, Florida

American Bonding Company
Los Angeles, California

American Centennial Ins. Co.
Morristown, New Jersey

American Colonial Insurance Company
Little Rock, Arkansas

American Consumer Insurance Company
Woodbury, New York

American Family Mutual Insurance Company
Madison, Wisconsin

American Fidelity Fire Ins. Co.
Woodbury, N.Y.

American Fidelity Insurance Company
Oklahoma City, Oklahoma

American Guarantee & Liability Ins. Co.
Chicago, Illinois

American Homeowners Ins. Co. of D.C.
Washington, D.C.

American Liberty Insurance Company
Birmingham, Alabama

American Modern Home Insurance Company
Cincinnati, Ohio

American Mutual Reinsurance Company
Chicago, Illinois

American National Property & Casualty Co.
Springfield, Missouri

American Re-Insurance Company
New York, N.Y.

American Service Mutual Insurance Co.
Montgomery, Alabama

American Southern Insurance Company
Atlanta, Georgia

American Universal Insurance Company
Providence, Rhode Island

Archdale Mutual Insurance Co.
Charlotte, North Carolina

Arkwright-Boston Insurance Company
Waltham, Massachusetts

Atlanta Casualty Company
Atlanta, Georgia

Audubon Insurance Company
Baton Rouge, Louisiana

Auto-Owners Insurance Company
Lansing, Michigan

Automobile Club Insurance Company
Columbus, Ohio

Automobile Club Inter-Insurance Exchange
Maryland Heights, Missouri

Avemco Insurance Company
Bethesda, Maryland

BLC Insurance Company
Des Moines, Iowa

Badger Mutual Insurance Company
Milwaukee, Wisconsin

Badger State Mutual Casualty Company
Milwaukee, Wisconsin

Balboa Insurance Company
Newport Beach, Ca.

Bankers Multiple Line Insurance Co.
Chicago, Illinois

Bankers Mutual Insurance Co. of D.C.
Silver Spring, Maryland

Belk Stores Insurance Reciprocal
Charlotte, North Carolina

Bellefonte Insurance Company
Middletown, Ohio

Brotherhood Mutual Insurance Company
Fort Wayne, Indiana

B S P Insurance Company
Scottsdale, Arizona

Buffalo Reinsurance Company
Los Angeles, California

Cal-Farm Insurance Company
Berkeley, California

California Casualty Indemnity Exchange
San Mateo, California

California Casualty Insurance Company
San Mateo, California

Cameron Mutual Insurance Company
Cameron, Missouri

Canadian Universal Ins. Co., Ltd.
Providence, Rhode Island

Carolina Casualty Insurance Company
Jacksonville, Florida

Carriers Insurance Company
Des Moines, Iowa

Casualty Indemnity Exchange
Jefferson City, Missouri

Casualty Insurance Company
Chicago, Illinois

Catholic Relief Ins. Co of America
Omaha, Nebraska

Center Mutual Insurance Company
Rugby, North Dakota

Central Lloyds
Amarillo, Texas

Central National Insurance Co. of Omaha
Omaha, Nebraska

Champion Insurance Company
Birmingham, Ala.

Chicago Insurance Company
Chicago, Illinois

Chicago Mutual Liability Company
Chicago, Illinois

Chrysler Insurance Company
Troy, Michigan

Civil Service Employees Insurance Co.
San Francisco, California

Classified Insurance Corporation
Milwaukee, Wisconsin

College/University Ins. Co. of America
Indianapolis, Indiana

Colonial Assurance Company
Wayne, Pennsylvania

Colonial Insurance Co. of California
Newport Beach, CA

Colorado Farm Bureau Mutual Ins. Co.
Denver, Colorado

Comco Insurance Company
Amarillo, Texas

Commercial Standard Insurance Company
Fort Worth, Texas

Commodore Insurance Co.
Houston, Texas

Commonwealth Fire and Casualty Ins. Co.
Louisville, Kentucky

Concord General Mutual Insurance Co.
Concord, New Hampshire

Cornhusker Casualty Company
Omaha, Nebraska

Continental Western Insurance Company
Des Moines, Iowa

Cotton Belt Insurance Company, Inc.
Memphis, Tennessee

Cotton States Mutual Insurance Company
Atlanta, Georgia

Country Casualty Insurance Company
Bloomington, Illinois

Country Mutual Insurance Company
Bloomington, Illinois

Countryside Casualty Company
Columbia, Missouri

Countrywide Insurance Company
Los Angeles, California

Covington Mutual Insurance Company
Indianapolis, Indiana

Credit General Insurance Company
Springfield, Ohio

Criterion Insurance Company
Washington, D.C.

Cumis Insurance Society, Inc.
Madison, Wisconsin

Dairyland Insurance Company
Scottsdale, Arizona

John Deere Insurance Company
Moline, Illinois

Delta Lloyds Insurance Co.
Houston, Texas

Dependable Insurance Company, Inc.
Jacksonville, Florida

Detroit Auto Inter-Insurance Exchange
Dearborn, Michigan

Diversified Insurers Company
Des Moines, Iowa

Dixie Auto. Insurance Company, Inc.
Birmingham, Alabama

Donegal Mutual Insurance Company
Marietta, Pennsylvania

Drake Insurance Company of New York
New York, New York

Early American Insurance Company
Fort Worth, Texas

Early Settlers Insurance Company
Richmond, Virginia

Economical Mutual Insurance Company
Kitchener, Ontario, Canada

Elkhorn Insurance Co.
New York, New York

Emmco Insurance Company
South Bend, Indiana

Empire Fire and Marine Insurance Company
Omaha, Nebraska

Empire Indemnity Insurance Company
Omaha, Nebraska

Empire Insurance Company
Santa Ana, California

Employers Reinsurance Corporation
Kansas City, Missouri

Erie Insurance Company
Erie, Pennsylvania

Erie Insurance Exchange
Erie, Pennsylvania

Excalibur Insurance Co.—Minnesota
Carrollton, Texas

Excalibur Insurance Company—Texas
Carrollton, Texas

Family Insurance Corporation
Shawand, Wisconsin

Farm Bureau Mutual Ins. Co. of Ark., Inc
Little Rock, Arkansas

Farm Bureau Mutual Ins. Co. of Idaho
Pocatello, Idaho

Farm Bureau Mutual Insurance Co. of Iowa
West Des Moines, Iowa

Farm Bureau Mutual Ins. Co., Inc. (Kan.)
Manhattan, Kansas

Farm Bureau Mutual Insurance Co. of Mo.
Jefferson City, Missouri

Farm Bureau Insurance Co. of Nebraska
Lincoln, Nebraska

Farm Bureau Town & County Ins. Co. of Mo.
Jefferson City, Missouri

Farmers and Merchants Insurance Company
Tulsa, Oklahoma

Farmers Automobile Ins. Association
Pekin, Illinois

Farmers Mutual Hail Ins. Co. of Iowa
Des Moines, Iowa

Farmers Mutual Ins. Co. of Nebraska
Lincoln, Nebraska

Farmers Reliance Insurance Co. of N.J.
Trenton, New Jersey

Farmland Mutual Insurance Co.
Des Moines, Iowa

The FB Insurance Company
Louisville, Kentucky

Federal Kemper Insurance Company
Decatur, Illinois

Federated Guaranty Mutual Insurance Co.
Montgomery, Alabama

Federated Rural Electric Ins. Corp.
Madison, Wisconsin

Fidelity Southern Insurance Company
Augusta, Georgia

Financial Indemnity Company
Los Angeles, California

First American Insurance Company
Kansas City, Missouri

First Fidelity Insurance Corporation
Oklahoma City, Oklahoma

First of Georgia Insurance Company
Augusta, Georgia

First of Georgia Underwriters Company
Augusta, Georgia

Florida Farm Bureau Cas. Ins. Co.
Gainesville, Florida

Florida Farm Bureau Mutual Ins. Co.
Gainesville, Florida

Foremost Insurance Company
Grand Rapids, Michigan

Forum Insurance Company
Chicago, Illinois

Foundation Reserve Ins. Co., Inc.
Las Vegas, New Mexico

Frankford Union Mutual Ins. Co.
Philadelphia, PA

Gamut Indemnity Company
Kansas City, Missouri

Garden State Fire & Casualty Co.
Newark, New Jersey

General Casualty Company of Illinois
Madison, Wisconsin

General Casualty Co. of Wisconsin
Madison, Wisconsin

General Reinsurance Corporation
Greenwich, Connecticut

Georgia Farm Bureau Mutual Ins. Co.
Macon, Georgia

Gerling Global Reinsurance Corporation
New York, New York

Glacier General Assurance Co.
Missoula, Montana

Globe American Casualty Company
Cleveland, Ohio

Government Employees Insurance Company
Washington, D.C.

Grange Insurance Association
Seattle, Washington

Grange Mutual Casualty Company
Columbus, Ohio

Great American of Dallas Fire & Cas. Co.
Westerville, Ohio

Great Southwest Fire Insurance Company
Scottsdale, Arizona

Great West Casualty Company
South Sioux City, Nebraska

Green Mountain Insurance Co., Inc.
Concord, N.H.

Grinnell Mutual Reinsurance Company
Grinnell, Iowa

Group Insurance Co. of Michigan
Dearborn, Michigan

Guarantee Insurance Company
Richardson, Texas

Guaranty National Insurance Company
Denver, Colorado

Hamilton Insurance Company
Washington, D. C.

Harbor Insurance Company
Los Angeles, California

Hargo National Insurance Company
Milwaukee, Wisconsin

Harleysville Mutual Insurance Company
Harleysville, Pennsylvania

Hawkeye Mutual Hail Ins. Co.
Fort Dodge, Iowa

Herald Fire Insurance Company
Jacksonville, Florida

Heritage Mutual Insurance Company
Sheboygan, Wisconsin

Home Mutual Insurance Company
Appleton, Wisconsin

Ideal Mutual Insurance Company
New York, New York

Illinois Founders Insurance Company
Chicago, Illinois

Implement Dealers Mutual Insurance Co.
Grand Forks, North Dakota

IMT Insurance Company
Des Moines, Iowa

Independent Indemnity Company
Santa Ana, California

Independent Fire Insurance Co.
Jacksonville, Florida

Industrial Fire & Casualty Company
Dallas, Texas

Inland Insurance Company
Lincoln, Nebraska

Inland Mutual Insurance Company
Huntington, West Virginia

The Insurance Company of Iowa
West Des Moines, Iowa

Insurance Company of Florida
Omaha, Nebraska

Integrity Mutual Insurance Company
Appleton, Wisconsin

Integon General Insurance Corporation
Winston-Salem, North Carolina

International Fidelity Insurance Co.
Newark, New Jersey

The International Insurance Co.
Takoma Park, Maryland

Interstate Fire and Casualty Company
Chicago, Illinois

Interstate Reinsurance Corporation
Chicago, Illinois

Iowa Mutual Insurance Company
Dewitt, Iowa

John Wesley Fire & Casualty Ins. Co.
Indianapolis, Indiana

Kentucky Casualty Insurance Company
Lexington, Kentucky

Kentucky Central Insurance Company
Lexington, Kentucky

Kentucky National Insurance Company
Lexington, Kentucky

Kentucky Farm Bureau Mutual Ins. Co.
Louisville, Kentucky

Kentucky Insurance Company
Louisville, Kentucky

Keystone Insurance Company
Philadelphia, Pennsylvania

KFB Insurance Company, Inc.
Manhattan, Kansas

Lakeland Fire & Casualty Co.
Omaha, Nebraska

League General Insurance Company
Detroit, Michigan

Le Mars Mutual Insurance Co. of Iowa
Dewitt, Iowa

Liberty National Fire Insurance Co.
Birmingham, Alabama

Lincoln Insurance Company
Princeton, New Jersey

Lincoln Mutual Casualty Company
Troy, Michigan

Lloyds of New Mexico Insurance Company
Las Vegas, New Mexico

Lloyds, New York
New York, New York

Louisiana Farm Bureau Mutual Ins. Co.
Baton Rouge, Louisiana

Lutheran Benevolent Insurance Exchange
Alma, Missouri

Madison County Mutual Auto. Ins. Co.
Edwardsville, Illinois

Members Insurance Company
Dallas, Texas

Members Mutual Insurance Company
Dallas, Texas

Members Service Insurance Company
Dallas, Texas

Merchants Mutual Bonding Company
Des Moines, Iowa

Meridan Mutual Insurance Company
Indianapolis, Indiana

Merit Insurance Company
Chicago, Illinois

Meritplan Insurance Company
Newport Beach, Ca.

M.F.A. Mutual Insurance Company
Columbia, Missouri

Michigan Educational Employees Mut. Ins.
Oak Park, Michigan

Michigan Mutual Auto Ins. Co.
Traverse City, Michigan

Mid-America Fire and Marine Ins. Co.
Kansas City, Missouri

Mid-Continent Casualty Company
Tulsa, Oklahoma

Mid-Continent Insurance Company
Somerset, Pennsylvania

Midland Casualty Insurance Company
New York, N.Y.

Midland Indemnity Insurance Company
New York, N.Y.

Midland Insurance Company
New York, New York

Midland Union Mutual Insurance Company
Juneau, Wisconsin

Midwest Mutual Insurance Company
West Des Moines, Iowa

Midwestern Indemnity Company
Milford, Ohio

Midwestern National Ins. Corp.
Milwaukee, Wisconsin

Millers Mutual Insurance Assoc. of Ill.
Alton, Illinois

Milwaukee Mutual Insurance Company
Milwaukee, Wisconsin

Minnehoma Insurance Company
Tulsa, Oklahoma

Mississippi Farm Bur. Mut. Ins. Co.
Jackson, Mississippi

Montgomery Ward Insurance Company
Chicago, Illinois

MONY Reinsurance Corp.
New York, N.Y.

Morrison Assurance Co., Inc.
Mobile, Alabama

Mortgage Guaranty Insurance Corp.
Milwaukee, Wisconsin

Motor Club of America Insurance Company
Newark, New Jersey

Motor Club Insurance Association
Omaha, Nebraska

Motor Club of Iowa Insurance Company
Davenport, Iowa

Motor Land Insurance Company
Dearborn, Michigan

Motor Vehicle Casualty Company
Providence, R.I.

Mt. Vernon Fire Insurance Co.
King of Prussia, Pa.

Mountain West Farm Bureau Mutual Ins. Co
Laramie, Wyoming

Munich American Reinsurance Company
New York, New York

Mutual Benefit Insurance Company
Huntingdon, Pennsylvania

National American Ins. Co. of New York
Allentown, Pennsylvania

Nassau Insurance Company
Jamaica, New York

National Farmers Union Prop. & Cas. Co.
Denver, Colorado

National Farmers Union Standard Ins. Co.
Denver, Colorado

National Fire & Marine Insurance Company
Omaha, Nebraska

National General Insurance Company—Miss.
Jackson, Mississippi

National General Insurance Co.—Mo.
St. Louis, Missouri

National Indemnity Company
Omaha, Nebraska

National Insurance Underwriters
St. Louis, Missouri

National Investors Fire & Cas. Ins. Co.
Little Rock, Arkansas

National Property Owners Ins. Co.
Nashville, Tennessee

National Reinsurance Corporation
New York, New York

National Trust Fire Insurance Company
Memphis, Tennessee

Nationwide General Insurance Company
Columbus, Ohio

Nationwide Mutual Fire Insurance Company
Columbus, Ohio

Nationwide Mutual Insurance Company
Columbus, Ohio

Newport Insurance Company
Newport Beach, Ca.

Nodak Mutual Insurance Company
Fargo, North Dakota

North American Co. for Prop. & Cas. Ins.
Chicago, Illinois

North American Reinsurance Corp.
New York, New York

North American Lloyds of Texas
Dallas, Texas

North Carolina Farm Bur. Mut. Ins. Co.
Raleigh, North Carolina

North East Insurance Company
Portland, Maine

Northern Ill. Farmers Mutual Insurance Co.
Arlington Heights, Illinois

North Pacific Insurance Company
Portland, Oregon

Northland Insurance Company
St. Paul, Minnesota

Northwest Farm Bureau Insurance Company
Salem, Oregon

North-West Insurance Company
Portland, Oregon

Occidental Fire and Casualty Company
Denver, Colorado

Ohio Farmers Insurance Company
Westfield Center, Ohio

Ohio Hardware Mutual Insurance Company
Mansfield, Ohio

Oklahoma Farm Bur. Mut. Ins. Co.
Oklahoma City, Oklahoma

Oklahoma Surety Company
Tulsa, Oklahoma

Old Reliable Fire Insurance Company
Webster Groves, Missouri

Old Security Casualty Insurance Company
Kansas City, Missouri

Olympic Insurance Company
Los Angeles, California

Omaha Indemnity Company
Omaha, Nebraska

Oregon Automobile Insurance Company
Portland, Oregon

Oregon Mutual Insurance Company
MC Minnville, Oregon

Pan American Fire & Casualty Company
Houston, Texas

Parliament Insurance Company
Northfield, Illinois

Paxton National Insurance Company
Harrisburg, Pennsylvania

Pekin Insurance Company
Pekin, Illinois

Peninsular Fire Insurance Company
Jacksonville, Florida

JC Penney Cas. Ins. Co.
Westerville, Ohio

Personal Service Insurance Company
Columbus, Ohio

Petroleum Casualty Company
Houston, Texas

Prairie States Fire Insurance Company
Sioux Falls, South Dakota

Preferred Risk Mutual Insurance Company
West Des Moines, Iowa

Presidio Insurance Company
Los Angeles, California

Professional Insurance Company
Kansas City, Missouri

Progressive Casualty Insurance Company
Cleveland, Ohio

Proprietors Insurance Company
Deleware, Ohio

Protective Fire & Casualty Company
Lincoln, Nebraska

Protective Insurance Company
Indianapolis, Indiana

Protective National Insurance Company
Omaha, Nebraska

Providence Washington Insurance Company
Providence, Rhode Island

Providence Washington Ins. Co. of Alaska
Providence, Rhode Island

Prudential Assurance Company, Ltd.
Montreal, Quebec, Canada

Puritan Insurance Company
Stamford, Connecticut

Ranger Insurance Company of New York
Houston, Texas

Ranger Lloyds
Houston, Texas

Regent Insurance Company
Madison, Wisconsin

Riverside Insurance Co. of America
Battle Creek, Michigan

RLI Insurance Company
Peoria, Illinois

Rochdale Insurance Company
New York, New York

Rocky Mountain Fire & Casualty Company
Seattle, Washington

Rural Mutual Insurance Company
Madison, Wisconsin

S & H Insurance Company
Los Angeles, California

Save-T-Risk Insurance Company
Columbus, Ohio

Scor Reinsurance Company
Dallas, Texas

Select Risk Mutual Fire Ins. Co.
Huntingdon, Pennsylvania

Shield Insurance Company
Atlanta, Georgia

Skandia America Reinsurance Company
New York, New York

South Carolina Farm Bureau Mut. Ins. Co.
Cayce, South Carolina

Southeast Title & Insurance Company
Lake Park, Florida

Southeastern Fire Insurance Company
Charlotte, North Carolina

Southern Farm Bureau Casualty Ins. Co.
Jackson, Mississippi

Southern Casualty Insurance Company
Alexandria, Louisiana

Southern Guaranty Insurance Company
Montgomery, Alabama

Southern States Insurance Exchange
Richmond, Virginia

Southern Trust Insurance Company
Macon, Georgia

Southwestern Insurance Company
Oklahoma City, Oklahoma

Southwestern National Insurance Company
Oklahoma City, Oklahoma

Standard Fire Insurance Co. of Alabama
Birmingham, Alabama

Standard Guaranty Insurance Company
Atlanta, Georgia

Standard Mutual Insurance Company
Springfield, Illinois

State Automobile & Casualty Underwriters
Des Moines, Iowa

State Automobile Insurance Association
Indianapolis, Indiana

State Automobile Mutual Insurance Co.
Columbus, Ohio

State Surety Company
Des Moines, Iowa

Statesman Insurance Company
Indianapolis, Indiana

St. John's Insurance Company, Ltd.
Hamilton, Bermuda

Stonewall Casualty Company
Fairmont, West Virginia

Stonewall Insurance Company
Birmingham, Alabama

Stuyvesant Insurance Company
Allentown, Pennsylvania

Summit Fidelity and Surety Company
Des Moines, Iowa

Surplus Underwriters Casualty Ins. Co.
New Orleans, La.

Sutter Insurance Company
San Francisco, California

Tennessee Farmers Mutual Insurance Co.
Columbia, Tennessee

Texas Farm Bureau Ins. Co.
Waco, Texas

Texas Farm Bureau Underwriters
Waco, Texas

Texas United Insurance Co.
San Antonio, Texas

Thomas Jefferson Insurance Company
Jacksonville, Florida

Thriftco Insurance Company
Los Angeles, California

Thurston Fire and Casualty Ins. Co.
Tulsa, Oklahoma

Tico Insurance Company
Dallas, Texas

Tower Insurance Company, Inc.
Milwaukee, Wisconsin

Town & Country Fire & Cas. Ins. Co.
Hutchinson, Kansas

Town & Country Insurance Company
Oklahoma City, Oklahoma

Transamerica Ins. Co. of Texas
Los Angeles, California

Transatlantic Reinsurance Company
New York, New York

Transamerica Insurance Company
Los Angeles, California

Transit Casualty Company
Los Angeles, California

Transport Indemnity Company
Los Angeles, California

Transport Insurance Company
Dallas, Texas

Twentieth Century Insurance Company
Los Angeles, California

United America Underwriters
San Diego, California

United Farm Bureau Mutual Insurance Co.
Indianapolis, Indiana

United Fire Insurance Company
Chicago, Illinois

United National Insurance Company
Philadelphia, Pennsylvania

United Services Automobile Association
San Antonio, Texas

United States Liability Ins. Co.
King of Prussia, Pa.

Universal Insurance Company
San Juan, Puerto Rico

Universal Underwriters Insurance Company
Kansas City, Missouri

Universal Underwriters Lloyds
Kansas City, Missouri

USAA Casualty Insurance Company
San Antonio, Texas

USAA General Indemnity Co.
San Antonio, Texas

Utah Farm Bureau Insurance Company
Salt Lake City, Utah

Vernon Fire and Casualty Insurance Co.
Indianapolis, Indiana

Virginia Farm Bur. Mut. Ins. Co.
Richmond, Virginia

Virginia Mutual Insurance Company
Richmond, Virginia

Volkswagen Insurance Company
St. Louis, Missouri

Washington & Jefferson Mutual Ins. Co.
Celina, Ohio

Wesco Insurance Company
Amarillo, Texas

Westfield Insurance Company
Westfield Center, Ohio

Westfield National Insurance Company
Westfield Center, Ohio

Western Agricultural Insurance Co.
Phoenix, Arizona

Western Alliance Insurance Company
Providence, R.I.

Western Employers Insurance Co.
Fullerton, California

Western Farm Bur. Mut. Ins. Co.
Las Cruces, New Mexico

Western Lloyds Insurance Company
Beaumont, Texas

Western States Insurance Company
Freeport, Illinois

Western World Insurance Co., Inc.
Ramsey, New Jersey

Westmoreland Casualty Company
Greenburg, Pennsylvania

Wilshire Insurance Company
Los Angeles, California

Wolverine Insurance Company
Battle Creek, Michigan

Workmen's Auto Insurance Company
Los Angeles, California

Worldwide Underwriters Insurance Company
St. Louis, Missouri

York Insurance Company
Providence, R.I.

Zurich American Ins. Co. of Illinois
Chicago, Illinois

Zurich Insurance Company
Chicago, Illinois

APPENDIX

Supreme Court, U. S.
FILED
DEC 30 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-240

ST. PAUL FIRE & MARINE INSURANCE CO., AETNA CASUALTY & SURETY CO., TRAVELERS INDEMNITY OF RHODE ISLAND, TRAVELERS INDEMNITY CO. OF RHODE ISLAND, TRAVELERS INSURANCE CO., HARTFORD CASUALTY COMPANY and HARTFORD FIRE INSURANCE CO.,

Petitioners,

v.

DAVID M. BARRY, M.D., LEROY S. CHAPNICK, M.D., WALTER C. COTTER, M.D., PAUL J. M. HEALEY, M.D., ANTHONY F. MERLINO, M.D., PAUL B. METCALF, M.D., H. GERALD ROCK, M.D., and ROSARIO V. TOMASELLI, M.D.,

and

PENNY ANDREW, CONSTANCE V. BOISSE, CHRISTOPHER DANIELS, ARTHUR M. FERLAND, GLADYS L. SPAIGHT, and ALPHONSE D. VITULLO,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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Petition for Certiorari Filed August 12, 1977
Certiorari Granted October 31, 1977

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Docket Entries in the United States District Court for the District of Rhode Island

UNITED STATES DISTRICT COURT

District of Rhode Island

Civil Action No. 75-176

David M. Barry, M.D., Leroy S. Chapnick, M.D., Walter C. Cotter, M.D., Paul J. M. Healey, M.D., Anthony F. Merlino, M.D., Paul B. Metcalf, M.D., H. Gerald Rock, M.D., and Rosario V. Tomaselli, M.D.,

and

Penny Andrew, Constance V. Boisse, Christopher Daniels, Arthur M. Ferland, Gladys L. Spaight, and Alphonse D. Vitullo,

Plaintiffs,

against

St. Paul Fire & Marine Insurance Co., Aetna Casualty & Surety Co., Travelers Indemnity of Rhode Island, Travelers Indemnity Co. of Rhode Island, Travelers Insurance Co., Hartford Casualty Company and Hartford Fire Insurance Co.,

Defendants.

Date	Proceedings
1975	
June 4	Complaint filed together with appearance of Leonard Decof, Esq.
	Summons issued returnable 20 days after service.

Docket Entries in the United States District Court

Date	Proceedings
1975	
June 5	Pltffs' Motion for Production of Documents, etc. filed.
	Order Re: Pltff's Motion for Production of of Documents, etc granted and Deft's if they so desire, may file a motion to quash this order no later than June 13, 1975 entered and filed. (j)
6	Summons returned duly served and filed. (j)
5	Hearing on Motion to Compel. Motion Granted. Order entered and filed. (tjw)
10	Appearance of Kirk Hanson, Esq. as Attorney for St. Paul Fire & Marine Ins. Co. filed.
11	Deft. St. Paul's Mot. to Quash Order of June 5, 1975 filed. (tjw)
12	Affidavit of Thomas H. Swain filed as Exhibit A to St. Paul's Motion to Quash. (tjw)
	St. Paul Motion to file supplemental memorandum of law granted. (See face of Motion)
	Defts' Travelers Indemnity of R.I. Travelers Indemnity Co. of R.I. and Travelers Insurance Co's Motion to Quash Order to Produce Embodying Supporting memorandum filed together with appearance of Joseph V. Cavanagh, Esq.
13	Deft. Aetna Casualty and Surety Company's Motion to Quash filed together with appearance of George Vetter, Esq.

Docket Entries in the United States District Court

Date	Proceedings
1975	
June 18	Affidavit of Raymond H. Deck and Affidavit of Claude E. Glaser, filed. (d)
	Deft Hartford Casualty Company and Hartford Fire Ins. Co's Motion to Quash an Order filed together with appearance of Joseph Kelly, Esq.
25	Appearance of Walker B. Comegys, Esq., as co-counsel for St. Paul Fire & Marine Insurance Company filed. (A)
	Stipulation Re: Time for filing Deft's answers or motions in response to the complaint is hereby extended to August 15, 1975 entered and filed. (j)
July 2	Stipulation and Order Re: The time for filing Pltff's response to Deft's Motion to Quash is hereby extended to August 8, 1975 entered and filed. (j)
28	Amended Complaint filed. F
Aug. 4	Deft's Answer to amended complaint.
	Deft's Motion to Dismiss Count I of Pltff's amended complaint. F.
5	Pltffs' Motion for Class Certificate filed. F.
8	Pltffs' memorandum in opposition to motions to quash filed. F.
13	Deft's objection to Pltff's Motion for class certification filed. F.
14	Motion of Hartford Fire Ins. to Dismiss filed. F.

Docket Entries in the United States District Court

Date	Proceedings
1975	
Aug. 14	ORDER allowing Aetna Casualty until 9/3/75 to respond entered and filed.
15	Deft's Motion to Dismiss Count I filed. s
	Answer of Deft as to Counts II, III and IV filed. s
	Objection to Motion for Class Certification filed. s
22	Defendants' Travelers Indemnity of R.I., Travelers Indemnity Co. of R.I. and Travelers Insurance Co.'s Objection To And Request To Postpone Consideration of Pltffs' Motion For Class Certification filed. (A)
Sept. 3	Motion of the Aetna Casualty & Surety Company to Dismiss Counts I, II and III of the Amended Complaint and for Summary Judgment as to Count IV of the amended Complaint filed. (j)
	The Aetna Casualty & Surety Company's Objection to and request to postpone consideration of Pltffs' Motion for Class Certification filed. (j)
5	Letter re: Pre-trial Conference for Thursday, September 25, 1975 filed. s
Oct. 20	First Preliminary Pretrial Order Entered and filed. (A)
23	Appearance of Sidney S. Rosdeitcher, Esq., and Jack Hassid, Esq., attorneys for the defendant, The Aetna Casualty and Surety Company filed. (A)

Docket Entries in the United States District Court

Date	Proceedings
1975	
Oct. 24	ORDER LETTER re Motions to Dismiss and Summary Judgment entered and filed.
Nov. 7	Pltff's Motion for Extension of time to file additional memoranda and Order granting same until Nov. 10, 1975 entered and filed. (j)
	Deft Travelers Indemnity of R.I., Travelers Indemnity Company of R.I. and Travelers Insurance Company's Motion to Dismiss Counts II, III and IV of the Amended Complaint filed. (j)
	Motion of Deft. St. Paul Fire & Marine Insurance Company for Summary Judgment Against Pltffs on count IV of Pltffs' Amended Complaint filed.
	Motion of Deft. St. Paul Fire & Marine Ins. Co. to Dismiss Counts II and III of Pltffs' Amended Complaint filed. (j)
11	ORDER entered and filed. Time to file additional memoranda extended to and including November 12, 1975 at 9:00 A.M. tjw
19	Hearing on Motions to Dismiss and Motion for Summary Judgment. All Counts Dismissed by Court. If Mr. Mandell wants to Dismiss R. I. Corp., Crt. will consider abstention. Motion to be filed this week. Brief within 1 week from filing of Motion. Defts. Answer within 1 week. Defts. to prepare Order today. tjw

DATE	PROCEEDINGS
1975	
Nov. 21	Pltffs' Motion for Leave to File a Second Amended Complaint, with Amended Complaint attached. tjw
Dec. 1	Deft. Aetna Casualty & Surety Company's Objection to pltffs' Motion for Leave to File a Second Amended Complaint filed. (j)
1	Second Amended Complaint filed. z
2	Opinion Re: All four Counts of Pltffs' Amended Complaint are hereby dismissed and filed.
	Judgment entered and filed for All Defts on Count I of the Amended Complaint, no order to be entered as to Counts II III and IV of Pltffs' Amended Complaint pending decision by this court on Pltffs' Motion to file a Second Amended Complaint and Defts shall have 10 days to file motion and pltffs' shall have 10 days to respond entered and filed. (j)
4	Deft. Hartford Casualty Company and Hartford Fire Insurance Co's Objection to Pltff's Motion for leave to file a second amended complaint filed. (j)
5	Objction of Travelers Insurance Co. to Pltffs' Motion for Leave to file a Second Amended Complaint. (tjw)
9	Pltffs' Motion for Leave to file a Second Amended Complaint granted. (see face of motion) tjw

DATE	PROCEEDINGS
1975	
Dec. 18	Deft. St. Paul Fire & Marine Insurance Motion to Dismiss Counts 1, 2, and 3 of Second Amended Complaint and for Summary Judgment on Count 3. tjw
29	Motion of the Aetna Casualty & Surety Company to Dismiss Counts I and II of the Second Amended Complaint and for Summary Judgment as to Count III of the Second Amended Complaint filed. (d)
30	Motion of Defts Hartford Fire Insurance Company and Hartford Casualty Company to Dismiss Pltff's Second Amended Complaint filed. (d)
29	Motion of Deft Travelers Insurance Company to Dismiss Counts I, II and III of Pltffs' Second Amended Complaint filed. (d)
29	Pltffs' Notice of Appeal from Dismissal of Count 1 as against all defendants. tjw
	Bond for Costs on Appeal filed. tjw
1976	
Jan. 13	Motion for Stay of Proceedings filed. F.
	Deft. Aetna's Objection to Pltffs' Motion for Stay filed. F.
20	Deft., Travelers Insurance Company, Objection to Pltffs' Motion for a stay of Proceedings in Trial Court filed. (d)
22	Order Re: Pltffs' motion for a stay of proceedings denied and filed. (j)

Docket Entries in the United States District Court

Date	Proceedings
1976	
Jan. 22	Pltffs' may file additional memos pertaining to defts Motion to dismiss or for summary Judgment on or before Jan. 29, 1976. Defts may respond before Feb. 5, 1976.
Feb. 24	Clerk's Certificate filed. (d)
24	Record on Appeal forwarded to First Circuit court of Appeals. (d)
26	ORDER of Circuit Court dismissing appeal filed. /i
Mar. 17	Affidavit of John J. Messina delivered on Nov. 7, 1975 but filed in clerk's Office March 17, 1976 filed. (j)
19	OPINION re: Count III of the Second Amended Complaint is dismissed without prejudice. The Court will abstain from exercising jurisdiction over Counts I and II, and these counts are therefore dismissed. Defendants Aetna's and St. Paul's motions for summary judgment on Count III are granted; defendant Travelers' motion is denied. Defendants shall prepare an order accordingly, entered and filed. (p)
Apr. 1	ORDER Re: Defts' Motions to dismiss counts I and II of Pltffs' second amended complaint granted; Motions of Defts', Aetna Casualty and Surety Company and St. Paul Fire & Marine Insurance Co. for summary judgment with respect to count III of Pltff's second amended complaint

Docket Entries in the United States District Court

Date	Proceedings
1976	
	granted; Motion of deft Travelers Insurance co. for summary judgment on count III of Pltffs' second amended complaint denied; Motions of defts Hartford Casualty Company and Hartford Fire Insurance Co. and Travelers Insurance Co. to dismiss Count III of Pltffs' second amended complaint for failure to comply with Rule 9(b) of the Federal Rules of Civil Procedure granted. Judgment may be entered in accordance with this order. Entered and filed. (d)
2	Deft., Aetna Casualty & Surety Co., Motion for entry of judgment filed. (d)
14	JUDGMENT entered for Defendants, entered and filed. (d)
May 5	Notice of Appeal from the dismissal of the Pltffs' second amended complaint, as against all Defts as specified in Judgment entered on April 14, 1976 in favor of the Defts filed. (d)
	Costs appeal bond filed. (d)
14	Clerk's Certificate filed. (d)
	Record on Appeal forwarded to First Circuit Court of Appeals. (d)

Docket Entries in the United States Court of Appeals for the First Circuit

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Case No. 76-1226

DAVID M. BARRY, M.D., LEROY S. CHAPNICK, M.D., WALTER C. COTTER, M.D., PAUL J. M. HEALEY, M.D., ANTHONY F. MERLINO, M.D., PAUL B. METCALF, M.D., H. GERALD ROCK, M.D., and ROSARIO V. TOMASELLI, M.D.,

and

PENNY ANDREW, CONSTANCE V. BOISSE, CHRISTOPHER DANIELS, ARTHUR M. FERLAND, GLADYS L. SPAIGHT, and ALPHONSE D. VITULLO,

Plaintiffs,

against

ST. PAUL FIRE & MARINE INSURANCE CO., AETNA CASUALTY & SURETY CO., TRAVELERS INDEMNITY OF RHODE ISLAND, TRAVELERS INDEMNITY CO. OF RHODE ISLAND, TRAVELERS INSURANCE CO., HARTFORD CASUALTY COMPANY and HARTFORD FIRE INSURANCE CO.,

Defendants.

DATE	FILINGS—PROCEEDINGS
1976	
May 18	Record on appeal received and filed and case docketed.

Docket Entries in the United States Court of Appeals

DATE	FILINGS—PROCEEDINGS
1976	
24	Appearance of Leonard Decof for appellants filed. Appearance of Kirk Hanson for appellee, St. Paul Fire & Marine Ins. Co., filed.
25	Appearance of Walker B. Comegys for appellee, St. Paul Fire, etc., filed.
26	Appearance of Joseph V. Cavanagh for defendant filed.
27	Appearance of Mark S. Mandell for co-counsel for appellant filed.
May 28	Appearance of Sidney S. Rosdeitcher and Jack Hassid for appellee, Aetna Life & Casualty Co., filed. Appearance of Charles Lister for appellees filed.
June 1	Appearances of Thomas D. Gidley and Stephen J. Carlotti for appellee filed.
1	Motion filed. Order (Coffin, Ch.J.) enlarging time for filing of statement of issues and designation of contents to June 7, 1976. Notices mailed.
8	Statement of issues and designation of contents filed.
18	Motion filed. Order (Coffin, Ch.J.) enlarging time for filing brief and appendix for appellants to 7-27-76. Notices mailed.
18	Counterdesignation by appellees of the contents of the appendix received and filed.

Date	Filings—Proceedings
1976	
30	Appellees' motion to strike issues I. A. and I. B. from appellants' statement of issues and memorandum in support of appellees' motion to strike received and filed.
July 9	Petition for leave to file an amended notice of appeal; Application for extension of time to file appellants' brief; Appellants' objection to motion to strike issues 1A and 1B from statement of issues; Memorandum of points and authorities in opposition to appellees motion to strike issues 1A and 1B from appellants' statement of issues, filed.
July 14	Appellees' objection to appellant's request to file an amended notice of appeal. Appellees notice of joining appellant's request for an enlargement of time.
20	Order (Coffin, Ch.J.) enlarging time for filing brief for appellant and the appendix to three weeks after the decision on motion to strike. Notices mailed.
Aug. 12	Order (Coffin, Ch.J.) denying motion to strike and denying countermotion for leave to amend notice of appeal. Notices mailed.
25	Motion filed. Order (Coffin, Ch.J.) granting leave to appellants to file a brief of 75 pages of standard typographic printing or 100 pages by any other process. Notices mailed.

Date	Filings—Proceedings
1976	
27	Motion filed. Order (Coffin, Ch.J.) enlarging time for filing brief for appellant and appendix to Sept. 15, 1976. Notices mailed.
Sept. 15	Brief for appellant and appendix filed.
21	Motion filed. Order (Coffin, Ch.J.) enlarging time for filing brief for appellees to October 21, 1976. Notices mailed.
Oct. 21	Brief for appellees Aetna Casualty & Surety Co., Hartford Casualty Company and Hartford Fire Insurance Company, filed. Addendum to brief for appellees filed. Brief for appellees St. Paul Fire & Marine Ins., Cor [sic] and Travelers Ins. Co filed.
Oct. 26	Assigned for hearing at the November, 1976, session.
Nov. 3	Heard by Coffin, Campbell and Gignoux, J.J.
29	Motion filed. Order (Coffin, Ch.J.) enlarging time for filing appellants' further memorandum to and including December 1, 1976. Notices mailed.
Dec. 1	Appellants' post argument memorandum filed.
9	Defendants-Appellees' Joint Supplemental Memorandum filed.

Docket Entries in the United States Court of Appeals

Date	Filings—Proceedings
1977	
May 13	JUDGMENT: The judgment of the district court is affirmed in part; and the said judgment is vacated in part and remanded in part for further proceedings consistent with the opinion of the court filed this day. Appellants are to recover one half costs. Notices mailed. Opinion of the Court by Coffin, Ch.J., dissenting opinion by Campbell, J.
June 3	Verified and itemized bill of costs filed for appellants.
6	Motion filed. Order (Coffin, Ch.J.) staying mandate pending filing and disposition of petition for writ of certiorari in the Supreme Court to be filed by July 11, 1977. Notices mailed.
July 12	Motion filed. Order (Coffin, Ch.J.) staying mandate pending the filing and disposition of a petition for writ of certiorari in the Supreme Court to be filed by August 15, 1977, with notice of such filing to be filed promptly with the Clerk of this court. Notices mailed.
Aug. 17	Notice of filing petition for certiorari (77-240) August 12, 1977.
Nov. 7	Order of Supreme Court granting certiorari October 31, 1977.

Amended Complaint

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

C. A. No. 75-0176

David M. Barry, M.D., Leroy S. Chapnick, M.D., Walter C. Cotter, M.D., Paul J. M. Healey, M.D., Anthony F. Merlino, M.D., Paul B. Metcalf, M.D., H. Gerald Rock, M.D., and Rosario V. Tomaselli, M.D.

and

Penny Andrew, Constance V. Boisse, Christopher Daniels, Arthur M. Ferland, Gladys L. Spaight, and Alphonse D. Vitullo

v.

St. Paul Fire & Marine Insurance Co., Aetna Casualty & Surety Co., Travelers Indemity of Rhode Island, Travelers Indemnity Co. of Rhode Island, Travelers Insurance Co., Hartford Casualty Company and Hartford Fire Insurance Co.

AMENDED COMPLAINT

COUNT I

I

JURISDICTION

1. This action arises under the Sherman Anti Trust Act §§1 and 2 (15 U.S.C.A. §§1 and 2) and Clayton Act §§4 and 16 (15 U.S.C.A. §§15 and 26) as hereinafter more fully appears.

2. The matter in controversy exceeds the sum or value of Ten Thousand Dollars ($10,000.00) exclusive of interest and costs, and arises under the laws of the United States (28 U.S.C.A. §1331).

3. The matter in controversy arises under an act of Congress regulating commerce and protecting trade and commerce against unreasonable restraints and monopolies (28 U.S.C.A. §1337).

II

Parties

1. Plaintiffs David M. Barry, M.D., of Providence, Rhode Island, Leroy S. Chapnick, M.D., of North Providence, Rhode Island, Walter C. Cotter, M.D., of Providence, Rhode Island, Paul J. M. Healey, M.D., of Rumford, Rhode Island, Anthony F. Merlino, M.D., of North Providence, Rhode Island, Paul B. Metcalf, Jr., M.D., of Pawtucket, Rhode Island, H. Gerald Rock, M.D., of Warwick, Rhode Island and Rosario V. Tomaselli, M.D., of Providence, Rhode Island are practicing physicians licensed to practice medicine in the State of Rhode Island, who bring this action on behalf of themselves and all other similarly situated physicians who are licensed to practice in the State of Rhode Island.

2. Plaintiffs Penny Andrew of Pawtucket, Rhode Island, Constance V. Boisse of Pawtucket, Rhode Island, Christopher Daniels of Pawtucket, Rhode Island, Arthur M. Ferland of Providence, Rhode Island, Gladys L. Spaight of East Providence, Rhode Island and Alphonse

D. Vitullo of Barrington, Rhode Island are citizens of the State of Rhode Island presently under the care of physicians, and who are or may require medical care in the future, who bring this action on behalf of themselves, and all persons presently receiving medical care and attention, or who in the future may require medical care and attention from physicans and medical personnel in the State of Rhode Island.

3. The within action is maintainable as a class action be each of the aforedescribed classes of plaintiffs because:

a. Each class is so numerous that joinder of all its members is not practical.

b. There are questions of law or fact common to each class.

c. The claims of the representative parties are typical of the claims of their respective Classes.

d. The representative parties will fairly and adequately protect the interests of their respective classes.

4. The defendants, St. Paul Fire & Marine Insurance Co., (hereinafter referred to as "St. Paul") and Aetna Casualty & Surety Co., (hereinafter referred to as "Aetna"), are each national corporations licensed to sell insurance in the State of Rhode Island, all of which have been, at all times mentioned herein, and for a long time prior thereto engaged in the business of selling insurance in the State of Rhode Island.

5. The defendants, Travelers Indemnity of Rhode Island, Travelers Indemnity Co. of Rhode Island and Travelers Insurance Co., (hereinafter collectively referred to as "Travelers") are affiliated insurance companies, having common ownership, and are an integral part of a group of corporations doing business nationally and licensed to sell insurance in the State of Rhode Island, which have been, at all times mentioned herein, and for a long time prior thereto engaged in the business of selling insurance in the State of Rhode Island.

6. The defendants, Hartford Casualty Company and Hartford Fire Insurance Co., (hereinafter collectively referred to as "Hartford") are affiliated insurance companies, having common ownership, and are an integral part of a group of corporations doing business nationally and licensed to sell insurance in the State of Rhode Island, which have been, at all times mentioned herein, and for a long time prior thereto engaged in the business of selling insurance in the State of Rhode Island.

III

Nature of Interstate Commerce

7. Defendants, St. Paul, Aetna, Travelers and Hartford are corporations which presently are and have been for a long time prior hereto, engaged in the business of selling general liability insurance on a national scale, including the sale of such general liability insurance in the state of Rhode Island.

8. The defendants' insurance businesses are not separated into fifty (50) distinct territorial compartments which function in isolation from each other. Inter-relationships, interdependence and integration of activities in all of the states in which they operate are practical aspects of the defendants' methods of doing business.

9. All named defendants are, at the present time, and have, for a long period been, engaged in selling medical malpractice insurance to physicians, hospitals and other medical personnel in the state of Rhode Island and elsewhere throughout the United States within the ordinary conduct of their business. Premiums for this medical malpractice insurance are being, and have been, received from physicians, hospitals and other medical personnel in the state of Rhode Island and are and have been applied by the defendants in various aspects of the operation of their business outside the state of Rhode Island.

10. The defendant corporations own property, pay taxes, insure personnel, firms and corporations and otherwise engage in commerce throughout the United States.

11. Plaintiff physicians and hospitals are engaged in interstate commerce in that they purchase goods and materials from sources located throughout the United States, purchase and sell services from and to residents of other states, give medical education to persons who practice or who go on to practice medicine in various states, and engage in research, development and scientific studies for the advancement of medicine, health services and the cure

and treatment of diseases, and for the health of and to the benefit of persons throughout the United States.

IV

Cause of Action

12. The defendants, St. Paul, Aetna, Travelers, and Hartford over a period of years have so conducted their respective businesses of selling medical malpractice insurance in the State of Rhode Island that they have, at the present time, acquired a total monopoly in the sale of medical malpractice insurance to the end that all physicians, hospitals and other medical personnel buying medical malpractice insurance in the State of Rhode Island buy said insurance from defendants, St. Paul, Aetna, Travelers, and Hartford.

13. In establishing the aforesaid monopoly, the defendant corporations have created a condition whereby all physicians, hospitals and other medical personnel in the State of Rhode Island have come to rely upon said defendants for their medical malpractice insurance.

14. Said defendant corporations, and each of them, for a great number of years have realized large profits from the sale of medical malpractice insurance in the State of Rhode Island.

15. Said defendant corporations and each of them, for a great number of years have realized large profits from the sale of insurance other than medical malpractice in-

surance to persons, firms, and corporations in the State of Rhode Island.

16. Said defendants and each of them, have been permitted to realize said large profits from the sale of medical malpractice and other insurance by virtue of the fact that they have been licensed by the Insurance Commissioner of Rhode Island to sell insurance within the State of Rhode Island.

17. By virtue of the grant of said license to sell insurance in the State of Rhode Island, and by virtue of their creation of a monopoly in the sale of medical malpractice insurance, the defendant corporations, and each of them have obligations to the members of each of the aforementioned plaintiff classes and to the citizens of the State of Rhode Island concomitant with or counterbalancing to the aforesaid licenses and privilege granted them.

18. By virtue of having created the aforesaid monopolies in the sale of medical malpractice insurance, said defendant corporations have caused all physicians, hospitals and other medical personnel as well as all patients and prospective patients and tax payers in the State of Rhode Island to be in a position of vulnerability and total depenence upon the good faith, integrity, and fairness of the defendant corporations.

19. For a long period of years, the plaintiff physicians, hospitals and other medical personnel have become accustomed to renewing their medical malpractice insurance with the defendant companies, and have come to rely on

the fact that such insurance would be renewed, and upon a reasonable price bearing a reasonable relation to economic conditions.

20. The defendants and each of them are, and have been, aware that under the present social and economic conditions, it is virtually impossible for a physician, hospital or other medical personnel to engage in the practice of medicine or provide medical services or treatment without medical malpractice insurance.

21. Defendant St. Paul is the largest single carrier of medical malpractice insurance in the State of Rhode Island, insuring approximately six hundred (600) physicians, and numerous hospitals within the State, all of which is known and has been known to defendants Aetna, Travelers and Hartford.

22. Defendants St. Paul, Aetna, Travelers, and Hartford in the past had established a policy of accepting applications for medical malpractice insurance from any and all qualified physicians, hospitals or other medical personnel within the State.

23. Almost all current medical malpractice insurance policies written by defendant, St. Paul for physicians, hospitals and other medical personnel in the State of Rhode Island bear an expiration date of June 30, 1975, all of which is known, and has been known to defendants Aetna, Travelers and Hartford.

24. All medical malpractice insurance policies written by defendants, St. Paul, Aetna, Travelers, and Hartford in the State of Rhode Island and elsewhere throughout the United States have always been written on a so called "Occurrence Basis". ("Occurrence-type" insurance covers the insured provider of medical services for every claim that arises or might arise from any act done during the time when the insurance coverage was in force.)

25. Upon information and belief, all medical malpractice insurance written by each insurance carrier throughout the United States has always been written on a so called "Occurrence Basis".

26. Upon information and belief, no medical malpractice insurance has ever been written any where in the United States on a "Claims Made" basis.

27. "Claims Made" insurance purports to insure the medical service provider only on the basis of insuring against those claims which are actually made and filed during the year in which the insurance is in force and effect, without regard as to when the alleged act of malpractice occurred. Thus, a medical service provider would have to buy a minimum of four (4) one-year policies in order to have coverage comparable to an "occurrence-type" policy.

28. On or about April 18, 1975, defendant, St. Paul, notified plaintiff physicians that under no conditions would it renew any of its "occurrence-type" medical malpractice insurance policies then in force and due to expire on June

30, 1975, but that it would issue to its insured one (1) year medical malpractice policies on a "Claims Made" basis only.

29. In addition, said defendant, St. Paul, has notified certain hospitals insured by it that their medical malpractice insurance then in force and due to expire on June 30, 1975, would not be renewed under any conditions.

30. Upon information and belief, defendants Aetna, Travelers and Hartford, beginning on or about April 18, 1975, and continuing up to and including the present time, conspired with defendant, St. Paul, and engaged in a continuing unlawful combination and conspiracy, unreasonably to deny any medical malpractice insurance coverage on an "Occurrence Basis" to all of the physicians insured with defendant, St. Paul, at said time.

31. Upon information and belief, defendants Aetna, Travelers and Hartford, beginning on or about April 18, 1975, and continuing up to and including the present time, conspired with defendant, St. Paul, and engaged in a continuing unlawful combination and conspiracy, unreasonably to deny any medical malpractice insurance coverage on any basis to certain hospitals insured with defendant, St. Paul, at said time.

32. In furtherance of the aforesaid unlawful combination and conspiracy, defendants, Aetna, Travelers and Hartford have made and carried out the policy of refusing, and have refused from April 18, 1975, to the present time, to accept any applications for medical malpractice insur-

ance of any type from any physicians, hospitals or other medical personnel presently insured by defendant, St. Paul.

33. The aforesaid unlawful combination and conspiracy of said defendants has consisted of a continuing agreement and concert of action among the defendants, the effect of which has been to place the physicans and hospitals and other medical personnel insured by St. Paul in the State of Rhode Island in a dilemma, whereby they can purchase medical malpractice insurance from one insurer only, to wit defendant, St. Paul, and that purchase must be made on terms dictated by the defendant, St. Paul.

34. The aforesaid unlawful combination and conspiracy of said defendants has consisted of a continuing agreement and concert of action the object and result of which has been a stifling of competition in the medical malpractice insurance market in Rhode Island, has given an exclusive monopoly to defendant St. Paul for the sale of medical malpractice insurance over six hundred (600) physicians and numerous hospitals and has, in effect, threatened to deprive said six hundred (600) physicians and numerous hospitals of their right to acquire medical malpractice insurance on a reasonable basis, and thus their right to engage in the practice of medicine and to provide medical services, all for no justifiable business reason.

35. Defendant St. Paul, in concert with defendants, Aetna, Travelers, and Hartford has engaged in a purposeful course of coercion, intimidation, boycott and unfair competition with respect to the sale of medical malpractice insurance in the State of Rhode Island.

V

DAMAGES

36. As a result of the aforesaid actions of the defendants, the physicians of Rhode Island insured by defendant, St. Paul, have been placed in the position where they are unable to obtain medical malpractice insurance on a reasonable basis after June 30, 1975.

37. As a result of the aforesaid actions of the defendants, the physicians of the State of Rhode Island may be forced to withhold medical services and disengage from the practice of medicine, except on an emergency basis, as a result of which the plaintiff patients and prospective patients will be deprived of medical care and treatment; and the health, safety, welfare and lives of the citizens of Rhode Island will become endangered.

38. As a result of the aforesaid actions of the said defendants, if medical services of the physicians are withheld, the hospitals in the State of Rhode Island will encounter grave financial difficulty, and some of them are in danger of becoming insolvent.

39. As a result of the aforesaid actions of the defendants, the plaintiff physicians are being deprived of their right to practice their profession and to earn a living in the State of Rhode Island.

40. The aforesaid unlawful combination and conspiracy has consisted of a continuing agreement and concert of action among the defendant co-conspirators, the substantial terms and objects of which have included:

a. A collective refusal to deal with and insure on an occurrence basis over six hundred (600) physicians and numerous hospitals presently insured by defendant, St. Paul.

b. Boycott, coercion and intimidation resulting in or tending to result in an unreasonable restraint of or monopoly in, the business of insurance in the State of Rhode Island and unreasonable restraint or interference with the practice of medicine.

c. Unfair discrimination between individuals of the same class in the rates charged for contracts for medical malpractice insurance.

d. A concerted agreement not to compete with each other for medical malpractice insurance clientele in the State of Rhode Island.

e. Horizontal fixing of prices for medical malpractice insurance issued in the State of Rhode Island.

f. Unfair discrimination between individuals of the same class and of essentially the same risk in the amount of premium, policy fees or rates charged for policies of medical malpractice insurance.

41. As a result of the foregoing, the health, welfare and public interest, and in fact, the entire economy of the State of Rhode Island are gravely and seriously threatened.

42. By reason of the foregoing, plaintiff physicians will suffer great losses of revenue, plaintiff hospitals will suffer great loss of profits and plaintiff patients will be forced to

pay great sums of money in the form of increased rates for hospital and medical care and attention in the future.

WHEREFORE, plaintiffs demand:

1. That a temporary restraining order, a preliminary injunction and a permanent injunction issue out of this court restraining and enjoining the defendants, and each of them, and their agents, servants and employees from acting or to deny, refuse or interfere with the plaintiff physicians and hospitals in the purchase or acquisition of medical malpractice insurance on an "occurrence basis" at reasonable rates, and from acting in concert or combination in this regard.

2. That a temporary restraining order, a preliminary injunction and a permanent injunction issue out of this court restraining and enjoining the defendants, and each of them, and their agents, servants and employees from acting in concert or combination as follows, or having the following objectives:

a. A collective refusal to deal with and insure on an "occurrence basis" all physicians and hospitals presently insured by defendant St. Paul.

b. Boycott, coercion and intimidation resulting in or tending to result in an unreasonable restraint of or monopoly in, the business of insurance in the State of Rhode Island and unreasonable restraint of or interference with the practice of medicine.

c. Unfair discrimination between individuals of the same class in the rates charged for contracts for medical malpractice insurance.

d. A concerted agreement not to compete with each other for medical malpractice insurance clientele in the State of Rhode Island.

e. Horizontal fixing of prices for medical malpractice insurance issued in the state of Rhode Island.

f. Unfair discrimination between individuals of the same class and of essentially the same risk in the amount of premium, policy fees or rates charged for policies of medical malpractice insurance.

3. That a temporary restraining order, a preliminary injunction and a permanent injunction issue out of this court restraining and enjoining the defendants, and each of them, and their agents, servants and employees from acting in concert and combination to coerce, intimidate or compel plaintiffs to act in any given manner with reference to the purchase of medical malpractice insurance, including, without limiting the generality of the foregoing, coercing or compelling any plaintiff physician to purchase medical malpractice insurance solely from defendant St. Paul or any other defendant insurance company.

4. That a temporary restraining order, a preliminary injunction and a permanent injunction issue out of this court restraining and enjoining the defendants, and each of them, and their agents, servants and employees from entering into, adhering to renewing, maintaining or furthering directly or indirectly, any like or similar combinations and conspiracies to restraining trade and commerce in the sale of medical malpractice insurance in the state of Rhode Island as hereinbefore alleged.

5. That this court ascertain the damages suffered by plaintiffs by reason of the unlawful acts of the defendants herein complained of and award judgment in favor of the named plaintiffs, the members of the plaintiff classes and against the defendants, and each of them, for thrice the amount of said damages, costs and a reasonable attorneys' fee.

All to the damage of the plaintiffs in the sum of One Hundred Million Dollars ($100,000,000.00).

COUNT II

I

Jurisdiction

1. Jurisdiction is based upon diversity of citizenship of plaintiffs and defendants under the provisions of (28 U.S.C.A. §1332).

2. The matter in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00) exclusive of interest and costs.

II

Parties

1-6. Paragraphs 1 through 6 of Section II of Count I are hereby incorporated by reference.

III

Cause of Action

7. Defendants St. Paul, Aetna, Travelers and Hartford since the inception of their offering medical malpractice insurance in the State of Rhode Island have been obligated and required by law to make certain disclosures of information regarding the operation and finances of their respective businesses, including, without limitation, with respect to the sale of medical malpractice insurance, the collection of premiums therefor, and the payment of claims.

8. On the basis of the aforesaid information furnished by the defendants to the Insurance Commissioner of the State of Rhode Island and to the plaintiffs, premium rates for medical malpractice insurance have been established.

9. On the basis of the aforesaid information furnished by said defendants, plaintiff physicians have, at all times herein mentioned, been paying premiums for medical malpractice insurance to said defendant companies.

10. Plaintiffs allege that defendants, and each of them, in violation of their obligations to plaintiffs and to the general public, fraudulently and deceitfully:

a. Failed to disclose material facts to the plaintiffs, the general public and the Insurance Commissioner of the State of Rhode Island.

b. Actively concealed material facts from the plaintiffs, the general public, and the Insurance Commissioner of the State of Rhode Island.

c. Furnished false information to the plaintiffs, to the general public and to the Insurance Commissioner of the State of Rhode Island.

d. Made material misrepresentations to the plaintiffs, to the general public and to the Insurance Commissioner of the State of Rhode Island.

11. Plaintiffs allege that defendants, and each of them, during the course of contract negotiations with plaintiff physicians for the purchase and sale of medical malpractice insurance for sale in the State of Rhode Island, fraudulently and deceitfully:

a. Failed to disclose material facts.

b. Actively concealed material facts.

c. Furnished false information.

d. Made material misrepresentations.

12. At all times herein mentioned, defendants, and each of them, knew or should have known of the falsity and misleading nature of the aforesaid information and misrepresentations.

13. Defendants, and each of them, made said false disclosure, concealed said information, and made said misrepresentations with the intent that the plaintiffs, the general public and the Insurance Commissioner of the State of Rhode Island be deceived thereby and rely thereon.

14. The plaintiffs at all times herein mentioned, have been unable to acquire the correct information concerning

such material facts, and until the filing of the within Complaint, have been ignorant of the true nature thereof.

15. Plaintiffs have at all times herein mentioned, relied on the aforesaid false information, and misrepresentations to their detriment.

16. As a direct result thereof, plaintiff physicians have, at all times herein mentioned, purchased medical malpractice insurance at premiums far in excess of the fair and justifiable rate which should have been charged them in accordance with current market conditions and the law.

17. As a direct result thereof, plaintiff patients have, at all times herein mentioned, been required to pay charges for medical treatment and hospitalization far in excess of fair and justifiable charges in accordance with the current market conditions, said excess charges being directly attributable to the unreasonably high premiums for medical malpractice insurance charged physicians and hospitals by said defendants as described herein.

WHEREFORE:

a. Plaintiff physicians demand that the defendants, and each of them, be ordered to make restitution to them of all premiums charged them in excess of the fair and justifiable rate which should have been charged from the inception of the offering and sale of medical malpractice insurance in the State of Rhode Island by the defendants to them.

b. Plaintiff patients demand that defendants, and each of them, be ordered to make full restitution to

them for all charges for medical attention and hospital care paid by them in excess of the fair and justifiable charges which should have been made, since the inception of the offering and sale of medical malpractice insurance by the defendants to physicians and hospitals in the State of Rhode Island.

c. Plaintiff physicians and patients demand that defendants, and each of them, be ordered to pay counsel fees, compensatory and punative damages in such sums as the court shall determine fair and justifiable.

COUNT III

I

Jurisdiction

1. Section I, Paragraphs 1 and 2 of Count II are hereby incorporated by reference.

II

Parties

1-6. Paragraphs 1 through 6 of Section II of Count I are hereby incorporated by reference.

III

Cause of Action

7-13. Paragraphs 7 through 13 of Section III of Count II are hereby incorporated by reference.

14. After making said false misrepresentations and disclosures, and fraudulently concealing said information, defendant St. Paul, announced that it would refuse to renew any of its policies of medical malpractice insurance for physicians commencing July 1, 1975 on any basis other than "claims-made", which they knew, or should have known, would be totally unacceptable to all their insured physicians.

15. Defendants, Aetna, Travelers and Hartford, at the same time, and thereafter, refused to offer medical malpractice insurance to any of defendant St. Paul's customers under any conditions whatsoever, thereby putting some six hundred (600) plaintiff physicians in a dilemma, wherein they could purchase medical malpractice insurance from St. Paul only, and then under conditions dictated by St. Paul; to wit, a "claims-made" basis.

16. The actions of defendants, and each of them, complained of in Counts I, II and III hereof, created a situation in the State of Rhode Island whereby the Governor, in order to provide medical malpractice insurance for physicians and assure the availability of health services to the citizens of the State of Rhode Island, including, but not limited to the class of plaintiff patients, was obligated to establish a joint underwriting association through which all physicians in the State of Rhode Island are obligated by law to purchase their medical malpractice insurance.

17. Upon information and belief, the rates for said medical malpractice insurance under said joint under-

writing authority will be substantially in excess of the rates previously paid by plaintiff physicians and of the rates which should have been paid by plaintiff physicians in the absence of misrepresentations, fraudulent conduct and other acts of defendants as complained of in Counts I, II, and III.

18. As a direct result thereof, plaintiff patients will be forced to incur expenses for medical services and hospitalization far in excess of what they should be charged in the absence of misrepresentations, fraudulent conduct and other acts of defendants as complained of in Counts I, II, and III.

WHEREFORE, plaintiff physicians and plaintiff patients demand that damages be assessed against the defendants, and each of them, to include compensatory damages, punitive damages and reasonable attorneys fees.

COUNT IV

I

JURISDICTION

1. Section I, Paragraphs 1 and 2 of Count II are hereby incorporated by reference.

II

PARTIES

1-6. Paragraphs 1 through 6 of Section II of Count I are hereby incorporated by reference.

III

CAUSE OF ACTION

7-15. Paragraphs 7 through 15 of Section III of Count II are hereby incorporated by reference.

16. The defendants, and each of them, misled plaintiff physicians into believing that medical malpractice insurance was not obtainable in the State of Rhode Island at the maximum rates established by the Insurance Commissioner of the State of Rhode Island, and fraudulently and deceitfully coerced certain of plaintiff physicians into purchasing medical malpractice insurance from said defendants at rates in excess of the maximum rates established by the Insurance Commissioner of the State of Rhode Island. In furtherance of such fraudulent scheme, defendants require that the plaintiff physicians purchasing said insurance at rates in excess of the maximum rates established by the Insurance Commissioner of the State of Rhode Island, sign a so-called "waiver form" devised and provided by defendants wherein the purchaser purports to represent to the selling insurance company that the insurance coverage that he desires to purchase is unavailable in the State of Rhode Island at rates at the maximum rate established by the Insurance Commissioner, and the purchaser therefore requests that the insurance company sell him such coverage at rates in excess of the maximum so established.

17. As a direct result thereof, defendants have sold to some of plaintiff physicians medical malpractice insurance at rates in excess of the maximum rates established

by the Insurance Commissioner of the State of Rhode Island, in contravention of the laws of the State of Rhode Island.

18. The defendants, and each of them, have, by coercion, intimidation, fraud, deceit and other actions complained of, supra, forced plaintiff physicians to enter into unconscionable contracts of insurance, in violation of the law and public policy.

19. As a direct result thereof, plaintiff physicians have been forced to expend unjustified and exhorbitant amounts for the purchase of medical malpractice insurance.

20. As a direct result thereof, patients have been, and will in the future be required to pay charges for medical treatment and hospitalization far in excess of the fair and justifiable charges in accordance with the then current market conditions.

WHEREFORE, plaintiff physicians and plaintiff patients demand that damages be assessed against the defendants, and each of them, to include compensatory damages, punitive damages and reasonable attorneys fees.

All to the damage of the plaintiffs in the sum of One Hundred Million Dollars ($100,000,000.00).

By their Attorney:

/s/ LEONARD DECOF

LEONARD DECOF
Leonard Decof, Ltd.
111 Wayland Avenue
Providence, Rhode Island 02906

Opinion of the District Court of the United States for the District of Rhode Island

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 75-176

DAVID M. BARRY, M. D. *et al.*

v.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, *et al.*

OPINION

(Rendered orally from the bench November 19, 1975)

PETTINE, Chief Judge. This is a class action brought on behalf of practicing physicians licensed to practice medicine in the State of Rhode Island and on behalf of citizens of Rhode Island who are presently under the care of physicians or who may require medical care in the future. The action is brought against four insurance companies, licensed to sell insurance in the State of Rhode Island, who are, and have been, engaged in selling medical malpractice insurance to physicians, hospitals, and other medical personnel in Rhode Island. The plaintiffs' amended

complaint alleges, in essence, that the four defendants have conspired to monopolize the business of selling medical malpractice in Rhode Island and, in violation of both federal antitrust law and state common law have, through various unfair trade practices and fraudulent misrepresentations, obtained the approval by the State Insurance Commissioner of excessive medical malpractice premium rates and have thereby been unjustly enriched at the plaintiffs' expense. Plaintiffs seek injunctive relief and $100,000,000 in damages. The case is presently before the Court on several motions by the defendants for dismissal on various grounds of all four counts of the complaint and for summary judgment on one of the counts.

I. COUNT I

Count I of the plaintiffs' amended complaint purports to set forth a private action under the federal antitrust laws. The gravaman of Count I is that the four defendant insurance companies violated sections 1 and 2 of the Sherman Act by conspiring to deny any medical malpractice insurance coverage on an occurrence basis to providers of medical services insured under malpractice policies issued by defendant St. Paul and by conspiring that defendants Aetna, Travelers, and Hartford would refuse to accept any applications for medical malpractice insurance of any type from providers presently insured by St. Paul. Plaintiffs contend that these conspiracies have been effectuated by a collective refusal to deal, by unfair insurance rate discrimination, by agreements not to compete, and by horizontal price fixing, and that the defendants have engaged in a

purposeful course of coercion, intimidation, boycott, and unfair competition with respect to the sale of medical malpractice insurance in Rhode Island.

All four defendants have moved that Count I be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted on the grounds that plaintiffs' claims under the Antitrust Acts are barred by the McCarran-Ferguson Act, 15 U.S.C. §§1011-1015, which allegedly exempts the defendants' challenged activities from the Antitrust Acts. In addition, three defendants have also argued that Count I should be dismissed because events occurring subsequent to the events alleged in Count I have rendered plaintiffs' action moot. The Court need not reach this mootness question because I find that Count I of the plaintiffs' amended complaint is barred by the McCarran Act.

The McCarran Act provides in pertinent part:

> "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948 . . . the Sherman Act, . . . the Clayton Act, and . . . the Federal Trade Commission Act, . . . shall be applicable to the business of insurance to the extent that such business is not regulated by state law."
> 15 U.S.C. §1012(b).

The Act also contains the following exception:

> "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to

> boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."
> 15 U.S.C. §1013(b).

It is not contested that the subject of this action is the "business of insurance." This case involves the relations between the defendant insurers and the insured physicians and hospitals,[1] the types and terms of the policies that are or that plaintiffs claim ought to be sold, and the rates to be charged therefor. These matters are precisely those aspects of the business of insurance Congress was considering in the McCarran Act:

> "Congress was concerned with the type of state regulation that centers around the contract of insurance . . . The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.' . . . [I]t is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the 'business of insurance.' "
> *S.E.C.* v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969).

Nor is it contested that the business of insurance is extensively regulated by the State of Rhode Island. For example, every foreign insurance company must obtain a license from the Insurance Commissioner each year before it

1. Although none of the named plaintiffs are hospitals, plaintiffs apparently consider hospitals in Rhode Island to be a part of the plaintiff class. All questions relating to class certification have been deferred until after resolution of the present motions.

can transact business in Rhode Island, R.I. Gen. Laws §27-2-11, and premium rates may not be excessive or unfairly discriminatory, R.I. Gen. Laws §27-9-4. Moreover, chapter 27-29 of Rhode Island's General Laws, entitled "Unfair Competition and Practices" was enacted with the explicit purpose of regulating the very misconduct and practices that, but for the McCarran Act, would be controlled by federal antitrust laws:

> "The purpose of this Chapter is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the act of congress of March 9, 1945 (public law 15, 79th congress) [i.e., the McCarran Act] by defining—or providing for the determination of—all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined and determined."
> R.I. Gen. Laws §27-29-1.

In addition, the area of medical malpractice insurance has been singled out for more particular state regulation and control by Emergency Regulation XXI, issued by the Rhode Island Director of Business Regulation, Insurance Division, which went into effect on June 16, 1975.[2]

Since the defendants' alleged misconduct involves aspects of the insurance business regulated by state law, the

2. Under the Emergency Regulation was created the Medical Malpractice Joint Underwriting Association of Rhode Island, which represents a new and comprehensive program for the provision of medical malpractice insurance in Rhode Island. Under the program, every insurer authorized to write personal injury liability insurance in Rhode Island is required to participate in the Association and to assist in the provision of medical malpractice insurance to providers of medical services in Rhode Island.

plaintiffs' private antitrust action is barred by the McCarran Act unless it falls within the exception for boycotts, coercion, or intimidation, 15 U.S.C. §1013(b), quoted *supra*. This Court is persuaded that, despite this provision's broad wording, which on first glance seems to support the plaintiffs' position, Congress intended this exception to be narrowly applied and that it does not, in fact, cover the situation presented in this case.

Both Courts of Appeals that have considered similar attempts to invoke the exception in 15 U.S.C. §1013(b) have concluded that such an application of the exception would be contrary to the legislative history of the Act and would "emasculate" and "vitiate" the Act and frustrate its purposes. *Meicler* v. *Aetna Casualty & Surety Co.*, 506 F.2d 732 (5th Cir. 1975); *Addrisi* v. *Equitable Life Assurance Society of the United States*, 503 F.2d 725 (9th Cir. 1974). *See also Transnational Insurance Co.* v. *Rosenlund*, 261 F.Supp. 12 (D.Ore. 1966). These cases hold that the purpose of the boycott, coercion, and intimidation exception was solely to protect insurance agents or other insurance companies from being "black-listed" by powerful combinations of insurance companies, not to affect the insurer-insured relationship. Thus, the District Court in *Meicler*, *supra*, explained:

> "This Court is convinced that Plaintiffs' reliance on §1013(b) is misplaced. It cannot be disputed that the terms boycott and coercion, as commonly defined, might be construed to encompass the type of activity attributed to Defendants in the instant case. An examination of the legislative history of this section reveals, however, that Congress was seeking to regulate a rather narrow area of activity bearing no resemblance to the situation described in Plaintiffs' Complaint. Section 1013(b) was designed primarily to deal with conspiracies or combinations among insurance companies and agents for the purpose of boycotting or refusing to deal with other insurance companies and agents. There is nothing in the legislative history or case law bearing on this section to indicate that it is applicable to a refusal by insurance companies to deal with particular segments of the public except under fixed classifications and premium rates."
> 372 F.Supp. 509, 513-14 (S.D. Tex. 1974).

"[T]o hold otherwise," wrote the Ninth Circuit in *Addrisi*, *supra*, "would vitiate the McCarran-Ferguson Act in its concept of setting over unto the several states the regulation, and protection of the insurer-insured relationship." 503 F.2d at 729.

This Court agrees with the interpretation of the legislative history of 15 U.S.C. §1013(b) presented in the *Meicler*, *Addrisi*, and *Rosenlund* decisions, *supra*, and adopts it as its own. Plaintiffs have failed to uncover any portion of the legislative history that would justify a contrary conclusion. The plaintiffs do cite and heavily rely upon the case of *Battle* v. *Liberty Nat'l Ins. Co.*, 493 F.2d 39 (5th Cir. 1974), *rehearing denied*, 503 F.2d 567, *cert. denied*, 419 U.S. 1110 (1975), however, contending that *Battle* stands for the proposition that §1013(b) can be applied to protect consumers as well as insurance companies and agents. The plaintiffs in *Battle*, however, were not insurance policyholders but rather business representatives of the insurance companies sued:

> "The plaintiffs in this class action are funeral homes and directors of funeral homes who allege that the de-

> fendants [insurance companies] are liable to them for violating the antitrust laws. . . . When the funeral home director signs a contract with [insurance companies], his funeral home becomes an 'authorized home for *servicing and furnishing merchandise to Liberty National burial insurance policyholders'.*" 393 F.2d at 42, 43. (emphasis added).

Thus, individual insureds were not parties to the action, and no exception to the McCarran Act was claimed for them. Furthermore, it should be noted that *Battle* was decided by the Fifth Circuit before it decided *Meicler* v. *Aetna Casualty & Surety Co., supra.* To the extent there is any inconsistency between the two cases, *Meicler* must be read as implicitly overruling *Battle.*

Plaintiffs in this case are individual insureds and their antitrust claims are thus not exempted by section 1013(b) from the limitations of the McCarran Act. Count I of plaintiffs' amended complaint is therefore dismissed.

II. COUNTS II, III, and IV

Count II of the plaintiffs' amended complaint is a diversity action based on the claim that the premium rates charged by the defendants for their malpractice insurance, as approved by the Rhode Island Insurance Commissioner, were excessive and were obtained by fraudulently concealing material facts, furnishing false information, and making material misrepresentations. Counts III and IV, also diversity actions are based on the conduct set forth in Counts I and II and allege that as a result of the defendants' fraudulent acts, Rhode Island was forced to create

a state agency to underwrite medical malpractice insurance that charges excessive premium rates, and certain plaintiff physicians were induced to purchase malpractice insurance at rates in excess of the maximum rates established by the Rhode Island Insurance Commissioner.

All the defendants have moved that Counts II, III, and IV of the amended complaint should be dismissed on the grounds that the allegations of fraud contained therein have failed to satisfy the special pleading requirements of Federal Rule of Civil Procedure 9(b). In addition, three of the defendants have moved that Counts II and III should be dismissed because plaintiffs failed to exhaust their state administrative remedies, or, in the alternative, that the Court exercise its discretion to abstain from exercising jurisdiction over these counts. These defendants have also moved for summary judgment in their favor on Count IV on the grounds that none of the named plaintiffs have any complaints against these defendants on the grounds alleged in Count IV and they therefore lack standing to bring the claims set forth in Count IV and are not members of the class they seek to represent.

The Court need not reach these questions, however, because it appears on consideration of a motion by defendant Travelers that this Court lacks jurisdiction to entertain any of the claims plaintiffs put forth in Counts II, III, and IV. As indicated *supra,* these three counts are all premised on diversity jurisdiction under 28 U.S.C. §1332. There is evidence before the Court, however, in the form of a communication from the Department of State of the State of Rhode Island, that defendant Travelers Indemnity Company of Rhode Island is a Rhode

Island Corporation. Since the named plaintiffs are all citizens of Rhode Island, there is a lack of complete diversity between all the plaintiffs on the one hand and all the defendants on the other, and thus under the well established rule there is no basis for the exercise of federal diversity jurisdiction. *Smith* v. *Sperling*, 354 U.S. 91 (1957); *Strawbridge* v. *Curtiss*, 3 Cranch. (7 U.S.) 267 (1806).[3]

Moreover, this it not an appropriate case for the Court to take pendent jurisdiction over Counts II, III, and IV. Even where the federal claim to which the state claims are to be appended is a substantial one, "pendent jurisdiction is a doctrine of discretion, not of plaintiffs' right. . . ." *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 726 (1965). The policies underlying pendent jurisdiction are less significant when the federal claim is a weak one, and the Supreme Court has stated flatly that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *Id.* Although the Court has since retreated somewhat from this hard and fast rule, in *Rosado* v. *Wyman*, 397 U.S. 397, 404 (1970), where substantial time and energy had been expended toward resolution of the state claim, such considerations are not present here. This litigation is less than six months old, and all discovery has been stayed pending resolution of the present motions. In the words of the American Law Institute:

3. There is no basis in this case for a realignment of the parties, such as occurred in *Broidy* v. *State Mut. Life Assur. Co. of Worcester, Mass.*, 186 F.2d 490 (1951) or *Robinson* v. *Warner*, C.A. No. 5253 (D.R.I. 1973), that could sustain diversity jurisdiction.

> "If the federal element that is the basis for jurisdiction is disposed of early in the case, as on the pleadings, it smacks of the tail wagging the dog to continue with a federal hearing of the state claim."
>
> American Law Institute, Study of the Division of Jurisdiction between State and Federal Courts, Official Draft, 1969, at 213, quoted in *McFadden Express, Inc.* v. *Adley Corp.*, 346 F.2d 424, 427 (2d Cir. 1965), *cert. denied* 382 U.S. 1026.

A further reason for refusing pendent jurisdiction in this case is the Supreme Court's admonition that federal courts avoid needless decisions of state law, "both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers of America* v. *Gibbs, supra*, 383 U.S. at 726. It is clear from the defendants' motions to dismiss Counts II, III, and IV on grounds other than lack of jurisdiction that the ultimate resolution of the plaintiffs' claims in this case would require explorations of several novel questions of state law, such as whether the administrative remedies provided by Rhode Island's statutes regulating the insurance industry were intended by the state legislature to totally preempt any common law causes of action which may have existed for recovering excessive insurance premiums.[4] It is also

4. In *Catalano* v. *Department of Hospitals of the City of New York*, 299 F.Supp. 166, 175 (S.D.N.Y. 1969), the Court refused to exercise pendent jurisdiction over a claim turning on the construction of a New York Social Services law on the grounds that the claim "presents a question of state legislative intent and delegation of powers to an administrative body, which more appropriately lies within the ambit of the state court's expertise with respect to its own laws."

noteworthy that the problem of medical malpractice insurance is currently the subject of intense public debate in Rhode Island, and the state government has recently taken major affirmative steps to come to grips with the problems in this area. These factors alone, of course, would not preclude this Court from taking pendent jurisdiction over Counts II, III, and IV, but when they are considered in light of the dismissal of the federal claim, the early stage of this litigation, and the complex questions of state law that are presented, I conclude that it would verge on an abuse of my discretion to exercise pendent jurisdiction in this case.

All four counts of the plaintiffs' amended complaint are hereby dismissed

/s/ RAYMOND J. PETTINE

Chief Judge

Nov. 25, 1975

Opinion of the United States Court of Appeals for the First Circuit

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 76-1226

DAVID M. BARRY, M.D., ET AL.,
PLAINTIFFS, APPELLANTS,

v.

ST. PAUL FIRE &
MARINE INSURANCE COMPANY, ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[HON. RAYMOND J. PETTINE, *U.S. District Judge*]

Before COFFIN, *Chief Judge*
CAMPBELL, *Circuit Judge*, and
GIGNOUX,* *District Judge*.

Leonard Decof, with whom *Mark S. Mandell* and *Leonard Decof, Ltd.* were on brief, for appellants.

Sidney S. Rosdeitcher, with whom *Paul, Weiss, Rifkind, Wharton & Garrison, Jack Hassid, Hinckley, Allen, Salisbury & Parsons, Thomas D. Gidley, Stephen J. Carlotti, Covington & Burling, Charles Lister, Jonathan M. Weisgall, Carroll, Kelly & Murphy*, and *Joseph A. Kelly* were on brief, for Aetna Casualty & Surety Co., Hartford Casualty Company and Hartford Fire Insurance Company, appellees.

Walker B. Comegys, with whom *Powers & Hall, Kirk Hanson, David P. Whitman, Hanson, Curran, Bowen & Parks, Joseph V. Cavanagh*, and *Higgins, Cavanagh & Cooney* were on brief, for St. Paul Fire & Marine Insurance Company and Travelers Insurance Company, appellees.

* Of the District of Maine, sitting by designation.

May 16, 1977

COFFIN, *Chief Judge.* The primary issue presented by this appeal is whether a "consumer" of insurance can sue an insurance company for violating the antitrust laws. Under the McCarran-Ferguson Act, 15 U.S.C. §§1011-15, "the business of insurance" is exempted from antitrust regulation to the extent that it is regulated by the states. *Id.* §1012(b). But McCarran-Ferguson does not confer a blanket immunity: insurers are subject to the Sherman Act if they engage in "acts of boycott, coercion, or intimidation" or if they agree to engage in such acts. *Id.* §1013(b). We must decide whether this exception applies only to insurance company boycotts of agents and other companies or also applies to refusals to deal with policyholders.

This suit is brought by plaintiffs seeking to represent two classes: all licensed physicians practicing in the state of Rhode Island and all citizens of Rhode Island who are or will be under a doctor's care. The defendants are four insurance companies that have sold malpractice insurance to Rhode Island doctors. The plaintiffs charges in their amended complaint that these companies violated the nation's antitrust laws by conspiring to shrink the malpractice coverage available to Rhode Island doctors. According to the complaint, one company, St. Paul Fire & Marine Insurance Company, changed its future malpractice policies to provide coverage only on a "claims made" basis, rather than an "occurrence"

basis.[1] When St. Paul's disgruntled customers tried to take their business elsewhere, the other insurance companies refused to sell them malpractice policies of any sort. Believing this to be the result of an unlawful conspiracy in restraint of trade, plaintiffs sought injunctive relief and treble damages.[2] The viability of their suit depends on the scope of the McCarran-Ferguson Act. 15 U.S.C. §1011-15.

The Act must be placed in historical context if it is to be understood. For many years, from 1869 to 1944, the Supreme Court steadfastly maintained that insurance was not "commerce" and that state regulation of insurance did not impinge on the federal government's power to regulate interstate commerce. *See, e.g., Paul* v. *Virginia,* 75 U.S. (8 Wall.) 168 (1869). In 1944, however, the Supreme Court repudiated the principle that insurance is not commerce and held that federal antitrust laws could constitutionally be applied to insurance companies. *United States* v. *South-Eastern Underwriters Ass'n,* 322

1. An "occurrence" policy protects the holder from liability for any act done while the policy is in effect; a "claims made" policy, in contrast, protects the holder only against claims made during the policy's life. Thus a doctor who practiced for only one year, say 1972, would need only one 1972 "occurrence" policy to be fully covered, but he would need several years of "claims made" policies to protect himself from claims arising out of his acts in 1972.

2. At our request, both sides briefed the question of whether the plaintiffs' antitrust claim was mooted when the state of Rhode Island formed a joint underwriting association to provide malpractice insurance. Because of the state's action, St. Paul never gathered the fruits of the alleged conspiracy. Nonetheless, we are convinced that, for purposes of our jurisdiction, the state's act did not extinguish plaintiffs' every claim for relief. *United States* v. *Concentrated Phosphate Export Ass'n, Inc.,* 393 U. S. 199, 203-04 (1968). We do not decide whether plaintiffs were in fact "injured in [their] business or property". 15 U.S.C. §15. *Cf.* n.7 *infra.* Nor do we decide whether this would be an appropriate case for injunctive relief.

U.S. 533 (1944). This decision left the nation's insurance companies and the states' regulatory bodies dumbfounded; suddenly, state taxation and regulation of insurance seemed open to serious constitutional doubts. Federal authorities were loath to assume the burden of substituting national for state supervision of insurance.

To restore some certainty, Congress passed the McCarran-Ferguson Act in 1945. The Act made it clear that state regulation and taxation of insurance could continue. It also narrowed the impact of federal law on the insurance business, stating that "the Sherman Act, . . . the Clayton Act, and . . . the Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law." 15 U.S.C. §1012(b). This provision allows the states to engage in a kind of "reverse preemption", and the states were quick to enact the necessary laws.

The parties agree that the defendants' acts were related to the business of insurance and that Rhode Island effectively regulates that business. *Cf. SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969); *FTC* v. *Travelers Health Ass'n*, 362 U.S. 293 (1960). The controversy in this case centers on an exception to the "preemptive" powers of the states: "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 15 U.S.C. §1013(b).

The district court concluded that "despite this provision's board wording, which on first glance seems to support the plaintiffs' position, Congress intended this exception to be narrowly applied and that it does not, in fact, cover the situation presented in this case." It held

that the "boycott, coercion, and intimidation" exception was intended by Congress solely to protect insurance agents or other insurance companies from being blacklisted by combinations of companies, and was not intended to have any bearing on the insurer-insured relationship. It also observed that a contrary holding would vitiate the McCarran-Ferguson Act by, presumably, cutting deeply into the area of regulation which has been given to the states. In so holding, it relied on the only case authorities which had dealt with this issue. *Addrisi* v. *Equitable Life Assurance Soc'y*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975); *Meicler* v. *Aetna Cas. & Sur. Co.*, 506 F.2d 732 (5th Cir. 1975); *Transnational Ins. Co.* v. *Rosenlund*, 261 F. Supp. 12 (D. Ore. 1966).

Six other district courts have now taken the same view. *Mathis* v. *Automobile Club Inter-Ins. Exch.*, 410 F. Supp. 1037 (W.D. Mo. 1976); *Proctor* v. *State Farm Mut. Auto. Ins. Co.*, 406 F. Supp. 27 (D. D.C. 1975); *McIlhenny* v. *American Tit. Ins. Co.*, 418 F. Supp. 364 (E.D. Pa. 1976); *Royal Drug Co.* v. *Group Life and Health Ins. Co.*, 415 F. Supp. 343 (W.D. Tex. 1976); *Seasongood* v. *K & K Ins. Ag'cy*, 414 F. Supp. 698 (E.D. Mo. 1976), *rev'd on other grounds*, —— F.2d —— (8th Cir. Jan. 6, 1977); *Frankford Hosp.* v. *Blue Cross*, 1976-2 Trade Cas. ¶61,030 (E.D. Pa. 1976).[3]

3. In attacking the district court's decision, appellants cite an additional case from the Fifth Circuit. *Battle* v. *Liberty Nat'l Life Ins. Co.*, 493 F.2d 39 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975). Although appellees correctly point out that *Battle* is distinguishable and that it was decided before *Meicler, supra*, the *Battle* court did show a willingness to give the boycott provision a straightforward reading, an attitude that we share. *See also Ballard* v. *Blue Shield*, 543 F.2d 1075, 1078 (4th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3601 (Mar. 8, 1977).

Since we feel compelled to disagree with this rather formidable array of authorities, we first try to summarize as fairly as we can the bases for their decision. We then make our own analysis of the wording of the statute and its legislative history. The line of cases begins with *Transnational Ins. Co.* v. *Rosenlund, supra.* Although the *Transnational* court found that it was not faced with a boycott even within the ordinary meaning of that word, it announced in passing that the boycott provision

> "was placed in the legislation to protect insurance agents from the issuance by insurance companies of a 'black-list,' which would name companies or agents which were beyond the *pale*. This list, in effect, was a directive to an agent not to write insurance in the name of or for the black-listed companies; otherwise, he would be stripped of his agency and not permitted to write insurance for any of the members of the governing organization of insurance companies." 261 F. Supp. at 26-27 [footnote omitted].

Only blacklisting by an insurance company, the court intimated, was subject to the Sherman Act under this provision. The court, though referring broadly to "the legislative history", cited only a single page of the Congressional record in support of this reading. 91 Cong. Rec. 1087 (1945). *Transnational* stood alone until 1974, when the Fifth and Ninth Circuits followed its lead. The courts of appeals simply adopted without elaboration the *Transnational* court's discussion of "the" legislative history. One reason for taking so narrow a view of the provision was the courts' apparent fear that any other reading would "emasculate", *Meicler, supra,* 506 F.2d at 734, or "vitiate",

Addrisi, supra, 503 F.2d at 729, the McCarran-Ferguson Act. To fend off this danger, the *Meicler* court adopted a rule that policyholders or members of the public could not seek the benefit of the boycott provision. Later cases have followed these pioneers without adding to their analysis.

As will be seen, we disagree with the conclusion reached by these courts. Simple disagreement might not be enough if the insurance business had long relied on authoritative rulings in other circuits. That is not the case here. The view we reject was not advanced until 1966, when a single district court suggested it. Only in the past three years has its narrow reading of the boycott provision begun to gain more general favor. What prevents us from following the trail blazed by the *Transnational* court is its decision to go behind the statutory language. We would be justified in probing legislative history if the language were ambiguous or if, even though unambiguous, the language literally read produced a senseless or unworkable statute. *Massachusetts Financial Serv., Inc.* v. *Securities Investor Protection Corp.,* 545 F.2d 754 (1st Cir. 1976). *Cf. United States* v. *Slater,* —— F.2d —— (1st Cir. Dec. 22, 1976).

The words "agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation", within the context of the Sherman Act, do not appear to us as ambiguous. In antitrust law, a boycott is a "concerted refusal to deal" with a disfavored purchaser or seller. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959).[4]

4. Most cases have dealt with boycotts directed against retailers or other links in the chain of production and distribution. *E.g., Fashion Originators' Guild of America, Inc.* v. *FTC,* 312 U.S. 457 (1941); *Radiant Burners, Inc.* v. *Peoples Gas Light and Coke Co.,*

(footnote continued on next page)

Concerted refusals by a number of companies to sell malpractice insurance policies to doctors who were dissatisfied with the policy offered by their insurer would seem to fit within this definition of boycott. Indeed appellees make no argument to the contrary. Nor do the cases attempt to justify their excursion into legislative history on the basis of ambiguity of language.

The articulated justification is based on the supposed "vitiation" of the McCarran-Ferguson Act if the boycott provision were to be given its normal Sherman Act scope. We observe first that a license to construe statutory words narrowly to avoid defeating legislative purpose is not to be cavalierly exercised. Under the McCarran-Ferguson Act,

364 U.S. 656 (1961). Consumers have less frequently been prey to illegal boycotts, perhaps because a large class of victims cannot easily be coerced without destroying the secrecy on which illegal boycotts often depend. But the features that make boycotts objectionable do not disappear when consumers are boycotted. Like boycotts aimed at retailers, concerted refusals to deal with consumers may restrain traders' "ability to sell in accordance with their own judgment"; they can deprive consumers of the "freedom to buy . . . in an open competitive market"; and they "interfere with the natural flow of interstate commerce". *See Klor's, Inc.* v. *Broadway-Hale Stores, Inc., supra,* 359 U.S. at 212-13. The Ninth Circuit has held that a boycott of customers is a boycott for antitrust purposes. *Washington State Bowling Proprietors Ass'n* v. *Pacific Lanes, Inc.,* 356 F.2d 371, 376 (9th Cir.), *cert. denied,* 384 U.S. 963 (1966).

Some commentators would artificially restrict the meaning of "boycott", apparently fearing an overbroad application of the rule that boycotts are illegal per se. *See* L. Sullivan, *Antitrust* §§83, 90 (1977). This fear may be allayed more directly by recognizing that, while some boycotts are irredeemably anticompetitive and thus fit subjects for a per se rule, others are benign and not properly treated as illegal per se. *See* P. Areeda, *Antitrust Analysis* 287 (1967); *see also Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71 (9th Cir. 1969) (boycott not illegal per se when participants had no anti-competitive motive). Certainly nothing in this opinion requires the application of a per se rule to all acts falling within the ordinary meaning of the word "boycott".

states were given authority to tax and regulate the business of insurance. This domain remains a vast one even if the boycott provision is read more broadly than appellees insist. McCarran-Ferguson would still insulate state tax and regulatory programs from challenges based on the dormant commerce clause. *See Prudential Ins. Co.* v. *Benjamin,* 328 U.S. 408 (1946). It would continue to protect the business of insurance from many federal regulatory statutes. *See, e.g., SEC* v. *National Securities, Inc., supra* (securities laws). Even within the antitrust field, McCarran-Ferguson would have great significance. Only the Sherman Act is made applicable to the business of insurance by the boycott provision; the Clayton and Federal Trade Commission Acts, for example, could still be "preempted" by state regulation. Moreover, not every violation of the Sherman Act can be characterized as an act of boycott, coercion, or intimidation. *See, e.g., United States* v. *Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945) (use of "benign" means to maintain monopoly violates Sherman Act); *Standard Oil Co.* v. *United States,* 221 U.S. 1, 43 (1911) (predatory pricing).

Nor would the introduction of antitrust principles into dealings between policyholders and insurers hamstring the state regulatory bodies that have primary responsibility for overseeing the nation's insurance business. A necessary regulatory measure could seldom be successfully challenged as a state-inspired "boycott, coercion, or intimidation", for the boycott provision merely guarantees that "[n]othing in *this chapter* shall render the Sherman Act inapplicable" to boycotts and the like. 15 U.S.C. §1013(b) [emphasis

added]. The chapter in question is the McCarran-Ferguson Act. The boycott provision merely neutralizes that Act, leaving intact the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), which today insulates state regulatory schemes outside the insurance context from antitrust liability. *See also Cantor* v. *Detroit Edison Co.*, —— U.S. —— (July 6, 1976). Indeed, *Parker* v. *Brown* may have added strength in the insurance field because of the policies reflected in the McCarran-Ferguson Act. But there is a large difference between allowing a state to fix insurance rates without fear of antitrust sanctions and similarly insulating companies which, outside any state-permitted structure or procedure, agree among themselves that customers dissatisfied with the coverage offered by one company shall not be sold any policies by any of the other companies. Contrary to the argument of some of the appellees, giving normal scope to the boycott provision will not plunge federal courts into the enterprise of retroactive rate-making. Regulation by the state would be protected; concerted boycotts against groups of consumers not resting on state authority would have no immunity.

When we look to public policy, the limitation sought by appellees again lacks support. Throughout this century, preserving competition by means of the antitrust laws has been a continuing national purpose. A primary aim of antitrust law is assuring consumers the benefits of a free market economy. To exclude consumers of insurance from the protection afforded by the boycott provision thus cuts against a basic policy of antitrust law. Such an interpretation also conflicts with the Supreme Court's view that the McCarran-Ferguson Act as a whole is meant to apply to

the relationship between policyholders and their insurers. *SEC* v. *National Securities, Inc., supra,* 393 U.S. at 460. The boycott provision presumably also reflects this concern for the insurer-insured relationship. On a broader scale, we note that legislative and judicial exceptions to the general rule favoring free competition have often been narrowed over the years. *See, e.g., Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (July 6, 1976) ("state action" exception restricted); *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 785-88 (1975) ("learned profession" exception questioned); *United States* v. *International Boxing Club of New York, Inc.,* 348 U.S. 236 (1955) (refusing to extend "baseball" exemption to boxing); *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384 (1951) (narrow view of Miller-Tydings "fair trade" exception). The McCarran-Ferguson Act is of course a legislative exception to the antitrust laws, and it deserves a fair reading.[5] But the artificial reading of the boycott provision that appellees urge on us can only be characterized as a judge-made expansion of the Act. We think the national commitment to a free market places a special burden on courts to think long and hard before creating such exceptions to the antitrust laws. In short, the usual reading of "boycott, coercion, or intimidation"

5. We cannot ignore, however, the great haste with which the Act was drafted and passed. The provision that all now agree is central to the Act—the exception of insurance to the extent that it is regulated by state law—did not appear in the Act until it was inserted by the House and Senate conferees. *See* 91 Cong. Rec. 488 (1945); *id.* 1945; *id.* 1396. Only at the last moment did a measure that was intended originally as a three-year moratorium on Sherman and Clayton Act coverage become a lasting exemption. This change was not noted in the conference report or the statement of the House conferees, *id.*, although it was uncovered by Senator Pepper in the floor debates. *Id.* at 1478.

does not lead to irrationality, nor does it pose a grave danger to state authority. It conforms to the nation's antitrust policies. We see no reason, therefore, to look to the legislative history for a special and narrow meaning of these words.

Nevertheless, in deference to the courts which have found support in that history, we have studied it in detail. The decision in *South-Eastern Underwriters, supra,* was issued on June 5, 1944. That decision approved an indictment charging that the members of an insurance underwriters' association "not only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force nonmember insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from [association] members on [association] terms." 322 U.S. at 535. Following that decision, an intensive several-month period of discussion produced a compromise measure agreed to generally by the insurance industry. The right of states to collect taxes from insurance companies had been put in doubt; the states' tax collecting effort would normally take place between February 20 and March 10, 1945. Thus legislative consideration was expedited, debate taking place between January 25 and February 27, 1945. The reports accompanying the bills being debated both referred to the boycott provision, stating "These provisions of the Sherman Act remain in full force and effect."[6]

In the first Senate debate, on January 25, the boycott provision was broadened by a quickly accepted amendment

6. S. Rep. No. 20, 79th Cong., 1st Sess. (1945), accompanying S. 340; and H. Rep. No. 143, 79th Cong., 1st Sess. (1945).

from "Nothing contained in this section shall render the Sherman Act inapplicable to any agreement or act of boycott . . ." to "Nothing in this act . . ." 91 Cong. Rec. 479 (1945). The chief issue debated, reflecting Senator O'Mahoney's concern, was whether the act could be used to authorize attempts to monopolize. Senator Ferguson, a sponsor, gave the answer: "No. I will answer that by saying that if agreements in restraint of trade or to monopolize amounted either to a boycott and/or coercion and/or intimidation, they would be absolutely void . . . ." *Id.* at 480.

The bill was debated in the House on February 14. The language concerning "agreement" to boycott had been stricken in committee, but the deletion was challenged by Congressman Celler, who said his concern reflected the view of the Attorney General. Congressman Celler, in arguing for the restoration of "agreement" language, adverted to the danger of an oral blacklist being issued by large companies which "would frighten the wits out of all these small companies", and an agreement of "separation" barring a company whose agent wrote insurance for a blacklisted company from participation in "the self-constituted governing organizations". *Id.* at 1087. On Congressman McCormack's suggestion, language was accepted proscribing "any agreement to boycott, coerce, or intimidate". Much of the debate then focused on the nature of the moratorium of three years on the general application of the Sherman and Clayton Acts.

The bill went to conference. The House, on February 23, agreed to the conference report without debate. In the Senate, on February 26, Senator Pepper was concerned about states taking action during the moratorium period

which would defeat the purpose of the antitrust acts. Senator Ferguson replied that states could not, even during the moratorium, "interfere with the application of the Sherman Act to any agreement . . . or . . . act of boycotting". *Id.* at 1443. On the next day, Senator Pepper levelled his attack at the basic provision making the Sherman, Clayton, and Federal Trade Commission Acts permanently inapplicable to the extent that states had regulated the industry. His concern was that price fixing could continue with impunity. Senator O'Mahoney reassured him that private agreements enforcing certain rates would remain violations with the restoration of the "agreement" language taken out but restored by the House. He added:

> "Therefore any attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which was attempting to do business in the insurance field in a way that was disapproved by them, would be absolutely prohibited by this provision." *Id.* at 1480.

Senator Pepper was not satisfied, believing that states could legitimize and therefore insulate rating bureaus. Senator Ferguson pointed out that "there are six things on which a State could not legislate. They are boycott, coercion, or intimidation, or agreements to boycott, coerce, or intimidate." *Id.* at 1481. He acknowledged that states would be permitted to authorize rating bureaus. Senator Pepper continued to gnaw at the issue, asking why the states should be given the right to "cloud" the Sherman and Clayton Acts. Again Senator O'Mahoney attempted reassurance by saying that there were three forms of regulation: state regulation permitted by the bill, federal regulation, which no one was urging, and private regulation by combinations "through private rules and regulations under which persons engaged in the insurance industry could be tried and convicted for the violation of private law". *Id.* at 1483. This latter type, he said, would be absolutely outlawed. Senator Pepper still felt that, with state-authorized rating bureaus being allowed by the bill, states were being given "carte blanche" to legitimize vices. *Id.* at 1484.

Senator O'Mahoney rejoined that "[t]he vice in the insurance industry . . . was not that there were rating bureaus, but that there was in the industry a system of private government which had been built up by a small group of insurance companies, which companies undertook by their agreements and understandings to invade the field of Congress to regulate commerce." *Id.* at 1485. After reading from the elaborate rules and regulations of a powerful association of insurance companies the Senator said, "The Insurance Executive Association undertook by regulation to coerce, intimidate, and boycott its own members and compel them to obey the rules and regulations the association itself prescribed." *Id.* at 1486.

Senator Barkley then asked if the boycott provision was sufficient to prevent combinations that do not involve boycott, coercion, or intimidation. Senator O'Mahoney replied,

> "[M]y judgment is that every effective combination or agreement to carry out a program against the public interest of which I have had any knowledge in this whole insurance study would be prohibited by the [boycott] section .... There are agree-

> ments and combinations in the public interests [sic] which can safely be permitted, but this agreement from which I have been reading is the sort of agreement which ought to be condemned . . . and which . . . would be completely outlawed." *Id.* at 1486.

The debate shortly ended and the conference report was accepted.

Assuming for the moment that we have license to go beyond the words of the statute, we cannot turn to the legislative history with our minds in equipoise. H. Hart and A. Sacks, *The Legal Process* 1264 (tent. ed. 1958). The plain meaning of the boycott provision, the strength of the nation's antitrust policies, and the substantial scope that an ordinary reading of the provision would leave to the McCarran-Ferguson Act—all these at the least create a presumption for the legislative history to overcome. Our question, then, is whether we can distill from this history the clear intent of Congress to limit "boycott, coercion, or intimidation" to acts or agreements affecting the relationships between insurance companies and their competitors and agents. The basis for appellees' argument lies in the remarks of Congressman Celler about the danger of blacklisting small companies and Senator O'Mahoney's remarks about the evil of private enforcement of private law by the companies. And it is true that at no point were any remarks directed to the possibility of boycotts, coercion, or intimidation aimed at consumers.

We would hesitate long before characterizing the Congressional intent as one narrowly restricting the boycott provision. We make two preliminary observations. The first is that *South-Eastern Underwriters,* which seems to

have been the ultimate source of the "boycott, coercion, or intimidation" language, apparently dealt in part with threats and boycotts directed at policyholders. 322 U.S. at 535. The second is that the insurance industry participated deeply in the drafting of this legislation; if the boycott provision were intended to cover less than what the Sherman Act would normally cover, one might suppose that the language would not have been left so bald and general.

Of more pertinence is the central role which the boycott provision played as the all purpose safety valve. It was amended twice, in each case to make it broader, first by making it effective across the entire Act and second by restoring the agreement language. Time after time the concerns of skeptics and opponents were met by reference to this provision. We cannot imagine that they would have been at all satisfied if they had understood that "boycott" was a code word confined to industry personnel. *See,* Levi *An Introduction to Legal Reasoning,* 15 U. Chi. L. Rev. 501, 522 (1948). The inescapable fact is that in this four-day debate the only specific references to evils were made on two occasions, once in the House and once in the Senate. Congressman Celler voted against the bill in the House and while Senator O'Mahoney was supporting the measure as an acceptable compromise and was on the committee of conference, he was not a sponsor. While the vice of insurance company self-government outside the law obviously lay in their minds as a major evil to be combatted by the legislation, there is no suggestion that the legislation was limited to that evil. Indeed Senator O'Mahoney referred to the Insurance Executives As-

sociation rules as "the sort of agreement" to be condemned. His summary answer to Senator Barkley that "every effective combination or agreement to carry out a program against the public interest" would be prohibited by the boycott section could not be more unrestricted.

We simply do not find in these debates or reports any evidence that would justify our reading the boycott provision in the special way urged by appellees. With all deference to the courts which have accepted the argument, we are reminded of the following advice of Mr. Justice Frankfurter:

> "Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute. While courts are no longer confined to the language, they are still confined by it. Violence must not be done to the words chosen by the legislature. Unless indeed no doubt can be left that the legislature has in fact used a private code, so that what appears to be violence to language is merely respect to special usage." Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 543-44 (1947).

We therefore reverse the lower court on this issue. The plaintiffs have charged the defendants with an unlawful boycott, and they are entitled to seek both injunctive relief and treble damages. *See Monarch Life Ins. Co.* v. *Loyal Protective Life Ins. Co.,* 326 F.2d 841 (2d Cir. 1963), cert. denied, 376 U.S. 952 (1964).[7]

7. We recognize that the dismissal could be affirmed if none of the plaintiffs have standing to sue. But the change in malpractice coverage has increased costs for the doctors. The alleged conspiracy

(footnote continued on next page)

The plaintiffs also object to the district court's decision to abstain on the plaintiffs' fraud claims, which were based on state law. In essence, plaintiffs pleaded that past and present insurance rates had been inflated by false statements to the public and the state insurance commissioner. Plaintiffs asked for restitution of all amounts paid in excess of a "fair and justifiable" malpractice insurance rate. Rhode Island courts have never ruled on the existence of a cause of action for recovery of excessive insurance premiums, but the district court noted that the state has provided elaborate administrative and judicial procedures for challenging existing rates. Rather than risk interfering with the state's regulatory scheme or misinterpreting state law, the district court abstained. Plaintiffs are apparently satisfied with the district court's decision to abstain with respect to insurance rates now in effect, for they do not appeal from that disposition. They do appeal from the court's abstention regarding past rates, which cannot be challenged administratively. The court's reluctance to take the case is understandable; recognizing a cause of action for the recovery of excessive past insurance premiums would profoundly affect the state's ratemaking machinery and policies. *See Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943); *Louisiana Power & Light Co.* v. *City of Thibodaux,* 360 U.S. 25 (1959). In cases like this, federal courts prefer to tread lightly, following trails already blazed by the

thus strikes at their "business or property", 15 U.S.C. §15, even if that phrase refers only to "commercial interests". *Hawaii* v. *Standard Oil Co.,* 405 U.S. 251, 264 (1972). And no one is more directly injured by a conspiracy among insurance sellers than those who buy the insurance. *See generally,* L. Sullivan, *Antitrust* §247 (1976). Because the doctors named as plaintiffs have standing, we find it unnecessary to decide whether the patients have standing or not.

state courts. Nonetheless, the court's jurisdiction over this claim was founded on diversity of citizenship. Abstaining in a diversity case often means completely relinquishing the case to the state courts; it thus defeats the purposes behind the grant of federal jurisdiction. A less drastic step might have served the purposes of the grant without unduly interfering in state regulatory matters. In Rhode Island, a novel and controlling question may be certified from the federal courts to the state courts. *See Lehman Bros.* v. *Schein,* 416 U.S. 386 (1974); R. I. Sup. Ct. Rule 6.

The district court did not certify this question. Two reasons for its choice are now advanced. First, the court's unappealed decision to abstain on the present rate question means that state courts and administrators will soon be wrestling with plaintiffs' claim, and it would not serve judicial economy for the federal court to begin work on a closely related claim. Second, even if a cause of action for recovering past premiums is proper, the federal court should abstain for fear of disrupting important state concerns. We doubt that either of these factors alone would permit abstention when balanced against the duty imposed on every federal court to decide cases within its jurisdiction. *See Meredith* v. *Winter Haven,* 320 U.S. 228 (1943). In combination, however, they persuade us that abstention was justifiable. *See Louisiana Power & Light Co.* v. *City of Thibodaux, supra,* 360 U.S. at 27 n. 2.

Appellants also object to the granting of summary judgment to two defendants, the Aetna and St. Paul insurance companies, on a count charging fraud in the sale of certain "consent to rate" policies. Plaintiffs offered

no evidence that any named physician-plaintiff ever bought such a policy from either Aetna or St. Paul, nor that any named patient-plaintiff was ever treated by a doctor holding such a policy. Appellants thus had at best only a tenuous right to bring this claim against these companies, *Haas* v. *Pittsburgh Nat'l Bank,* 526 F.2d 1083 (3d Cir. 1975), and we find no error in the district court's decision to adhere strictly to the traditional rules. *La Mar* v. *H & B Novelty & Loan Co.,* 489 F.2d 461, 469 (9th Cir. 1973). *See also O'Shea* v. *Littleton,* 414 U.S. 488, 494-95 (1974).

The district court disposed of the remaining charges of fraud in "consent to rate" policies by referring to Fed. R. Civ. P. 9(b). Rule 9(b) requires complaints charging fraud to state "with particularity" the circumstances constituting fraud. The judge found that the complaint did not meet the standards set by rule 9(b) and dismissed the count without prejudice. The judge was correct; the complaint could hardly be more vague. While the judge might have ordered a more definite statement, it was within his power to grant a dismissal without prejudice. If the plaintiffs can plead fraud with more particularity, they may file an amended complaint. 2A Moore's Federal Practice ¶9.03 p. 1934.

Affirmed in part; reversed and remanded in part.

Dissenting Opinion

CAMPBELL, *Circuit Judge* (dissenting in part). The court seems to me to be straining mightly to reinterpret the legal relationship ordinarily understood to have been established under the McCarran-Ferguson Act, perhaps because it has some doubts about the policies of that Act.

The McCarran-Ferguson Act declares that "the continued regulation and taxation by the several States of the business of insurance is in the public interest", 15 U.S.C. §1011, and "shall be subject to the laws of the several States which relate to the regulation or taxation of such business", §1012(a).[1] The Act goes on to say that no Act of Congress shall invalidate, impair or supersede state regulatory laws, §1012(b). Finally, it provides that the various antitrust statutes, including the Sherman Act, shall apply only to the extent a state does not exercise its right to regulate, §1012(b). The court concedes, as do the parties, that Rhode Island has exercised its right to regulate all material aspects of the business of insurance and that the actions complained of relative to withholding malpractice insurance were all part of such regulated business. Thus, under the clear implication of §1012, neither the Sherman Act nor the other antitrust laws apply except insofar as the §1013(b) exception permits. That exception provides, "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." Significantly this language does not track the broad "contract, combination . . . or conpiracy" language of the Sherman Act which Congress reasonably might have chosen had the intent been, as my brothers state, to encompass in the exception virtually all activities in violation of the Sherman Act involving more than an individual monopolist.

1. The Supreme Court has said that "[t]he relationship between insurer and insured, the type of policy which [can] be issued, its reliability, interpretation, and enforcement—these [are] the core of the 'business of insurance' " covered by the McCarran-Ferguson Act. *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969).

While the precise scope of the exception language may be less than crystal clear, given the statutory scheme, I have no difficulty understanding why two circuit courts and six district courts—every court except, now, ourselves—have held that the §1013(b) exemption is to be read narrowly as describing boycotts, coercion or intimidation directed against other companies and agents rather than, broadly, as also encompassing the gamut of company-policyholder relations. *See, e.g., Meicler* v. *Aetna Casualty & Surety Co.*, 372 F. Supp. 509, 513-14 (S.D. Tex. 1974), *aff'd*, 506 F.2d 732 (5th Cir. 1975). The legislative history indicates that the former problem was what worried Congress when it enacted the exception, and a narrow reading is more consistent with §1012 and with the purpose and structure of the act generally.[2] Indeed, to read §1013(b) expansively is to hold that what Congress gave with one hand it took with the other, since while my brothers' reading does not introdnce the entirety of federal antitrust law

2. I do not question that the boycott-coercion-intimidation language might in some other context be pushed to the limits which the court approves. But these words are hardly so focused as to permit only the broadest, most general meaning. A more limited interpretation, besides comporting with the statutory structure and the legislative history, squares with the Supreme Court's definition of a group boycott as "concerted refusals by traders to deal with other traders",

(footnote continued on next page)

into the business of insurance, it introduces a very major part thereof and does so with no clear explanation of why Congress should first take pains to eliminate the antitrust laws and then reintroduce by the back door most of the Sherman Act. Only if, like all other courts, we read §1013 (b) as dealing with a limited type of problem which troubled Congress does the exception fit sensibly into the statute as a whole.

The central thread running through the McCarran-Ferguson Act is that regulation of insurance rates and policies—both of them matters falling under the general heading of relations between companies and policy holders —is left to the states. The present litigation brought by physicians who believe that they have been deprived, unfairly, of insurance on terms that are economically favorable focuses precisely upon company-policyholder matters. My brothers are now putting the federal courts in the same arena as the State of Rhode Island, contrary, I believe, to the purposes of the McCarran-Ferguson Act. Doubtless the federal perspective is somewhat different but the poten-

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Klor's Inc. v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959). *See* L. Sullivan, Antitrust §90 at 257 (1976).

Furthermore, even reading the boycott exception to include the complained of behavior does not wholly solve the question of plaintiffs' standing. If St. Paul is attempting to corner the malpractice market, the more obvious harm is to those companies that are being closed out. It can be argued that the higher prices to doctors are only an indirect consequence and that the physicians have not suffered the sort of direct injury necessary to bring suit. *See Battle* v. *Liberty National Life Insurance Co.*, 493 F.2d 39, 49 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975) (plaintiff must show himself to be in sector of economy in which violation threatens to break down competitive conditions). This sort of problem suggests that the doctors' ostensible antitrust action is aimed less at protecting the free market system than at consumer protection goals left by Congress to state regulation. *See generally SEC* v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969).

tial for conflict between state regulation and federal antitrust policies is real and the decision has the effect of substantially undercutting §1012(b) of the Act.

This is, I think, a most unfortunate decision. It not only introduces a new category of federal antitrust suit which will be very difficult to manage at a time when federal courts are strained to the limit, but it could have unforeseeable effects upon state regulatory policies. Plaintiffs may see this case as another string to their bow in attempting to deal with the crushing malpractice burdens being imposed as the result not only, perhaps, of predatory insurance practices but of inflated claims and verdicts. We might sympathize with them without going this far. The State of Rhode Island has apparently now enacted regulatory legislation dealing with some or all of the problem—a means of redress which seems far more responsive to the problem than any likely to be achieved through reinterpreting the McCarran-Ferguson Act thirty years after enactment.

I shall not attempt to deal with the legislative history which my brothers make much of, beyond saying that, like most legislative history, it is capable of being argued both ways depending on which legislator one reads and to whose views one ascribes final authority. Certainly, in the expressed concerns of the legislators there is explicit support for the view which all other courts have adopted to date. More important to me, however, is the statutory scheme which suggests, in the positioning of the exception, and in the very fact that the exception is just that, that §1013(b) should be construed in a manner complementary to, rather than subversive of, the major premises of the Act. Under my brothers' reading, the tail now wags the dog.

I would affirm the district court which acted, I think, correctly and in accordance with all existing law.

Judgment of the United States Court of Appeals for the First Circuit

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 76-1226

DAVID M. BARRY, M.D., *et al.*,
Plaintiffs, Appellants,

v.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, *et al.*,
Defendants, Appellees.

JUDGMENT

Entered May 16, 1977

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed in part; and the said judgment is vacated in part and remanded in part for further proceedings consistent with the opinion of the court filed this day.

Appellants are to recover one half costs.

By the Court:

/s/ Dana H. Gallup
Clerk

[cc: Messrs. Decof, Rosdeitcher and Comegys.]

FEDERAL STATUTES

Title 15, Commerce and Trade

The Sherman Act

Section 1, 15 U.S.C. §1 (Supp. V, 1975):

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2, 15 U.S.C. §2 (Supp. V, 1975):

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

The Clayton Act

Section 4, 15 U.S.C. §15 (1970):

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States

in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 16, 15 U.S.C.A. §26, 90 Stat. 1396 (1976):

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

The McCarran-Ferguson Act

Section 1, 15 U.S.C. §1011 (1970):

Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States. Mar. 9, 1945, c. 20, §1, 59 Stat. 33.

Section 2, 15 U.S.C. §1012 (1970):

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Section 3, 15 U.S.C. §1013 (1970):

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade

Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Title 28, Judiciary and Judicial Procedure

28 U.S.C. §1254 (1970):

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C.A. §1331, 90 Stat. 2721 (1976):

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C. §1337 (1970):

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

Federal Rules of Civil Procedure

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings

(a) When Presented. A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h) (2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B)

if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.

STATE STATUTES AND REGULATIONS

Rhode Island General Laws

Title 27—Insurance

CHAPTER 9

Casualty Insurance Rating

27-9-4. Considerations in making of rates.—All rates shall be made in accordance with the following provisions:

1. Due consideration shall be given to past and prospective loss experience within and outside this state, to catastrophe hazards, if any, to a reasonable margin for underwriting profit and contingencies, to dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members or subscribers, to past and prospective expenses both country-wide and those specially applicable to this state, and to all other relevant factors within and outside this state;

2. The systems of expense provisions included in the rates for use by any insurer or group insurers may differ from those of other insurers or groups of insurers to reflect the requirements of the operating methods of any such insurer or group with respect to any kind of insurance, or with respect to any subdivision or combination thereof for which subdivision or combination separate expense provisions are applicable;

3. Risks may be grouped by classifications for the establishment of rates and minimum premiums;

4. Rates shall not be excessive, inadequate or unfairly discriminatory.

27-9-7. Filing of rate plans and systems.—Every insurer shall file with the commissioner every manual of

classification, rules and rates, every rating plan, rating system and every modification of any of the foregoing which it proposes to use; provided, however, that classification rates may be modified without additional filing to produce rates for individual risks which are lower than those filed and which evaluate variations in physical or moral hazards, individual risk experience or expense provisions, and which are not inadequate or unfairly discriminatory. Every such filing shall state the proposed effective date thereof and shall indicate the character and extent of the coverage contemplated. When a filing is not accompanied by the information upon which the insurer supports such filing, and the commissioner does not have sufficient information to determine whether such filing meets the requirements of the chapter, he may require such insurer to furnish the information upon which it supports such filing. The information furnished in support of a filing may include (1) the experience or judgment of the insurer or rating organization making the filing, (2) its interpretation of any statistical data it relies upon, (3) the experience of other insurers or rating organizations, or (4) any other relevant factors. A filing and any supporting information shall be open to public inspection.

27-9-15. Review of rates not covered by filings.—Within ten (10) days after any insurer shall have made or issued a contract or policy at a rate or premium other than is provided for by any filing made with the commissioner by or in its behalf, such insurer shall notify the commissioner in writing of such action in such form as the commissioner may require. The commissioner shall review such notice as soon as reasonably possible after it has been received by him, in order to determine whether such contract or policy has been written at a rate or premium which meets the requirements of this chapter. When such notice is not ac-

companied by the information upon which the insurer supports such rate or premium, and the commissioner does not have sufficient information to determine whether such rate or premium meets the requirements of the chapter, he shall require such insurer to furnish, within ten (10) days after receipt of notice of such requirement, the information upon which it supports such rate or premium. Unless within thirty (30) days after receipt of such notice or such supporting information, the commissioner shall issue an order following a hearing, as provided in §27-9-18, the rate or premium charged for such contract or policy shall be deemed to meet the requirements of this chapter; provided, however, that all contracts and policies issued under the provisions of this section shall state that the rate or premium charged therefor has not been reviewed by the commissioner and that it is subject to disapproval or modification as of the effective date of said contracts or policies.

27-9-16. Disapproval of filing within waiting period.—If within the waiting period or any extension thereof as provided in §27-9-10, the commissioner finds that a filing does not meet the requirements of this chapter, he shall send to the insurer or rating organization which made such filing written notice of disapproval of such filing specifying therein in what respects he finds such filing fails to meet the requirements of this chapter and stating that such filing shall not become effective.

27-9-18. Disapproval of filing after review period—Removal of discrimination.—If at any time subsequent to the applicable review period provided for in §27-9-16 or §27-9-17, the commissioner finds that a rate or filing does not meet the requirements of this chapter, he shall, after a hearing held upon not less than ten (10) days' written notice, specifying the matters to be considered at such hear-

ing, to every insurer and rating organization which used such rate or made such filing, issue an order specifying in what respects he finds that such rate or such filing fails to meet the requirements of this chapter, and stating when, within a reasonable period thereafter, such rate shall no longer be used or such filing shall be deemed no longer effective. Said order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in said order. If, however, the commissioner finds that an unfair discrimination exists in the application of a rate or filing to an individual risk he may, after a hearing held on like notice to the insurer affected and to any rating organization which made such filing, issue an order that such discrimination be removed. Copies of any order issued hereunder shall be sent to every such insurer and rating organization.

27-9-19. Hearings on application by persons aggrieved by filing—Order terminating filing—Removal of discrimination.—Any person or organization aggrieved with respect to any rate or filing which is in effect may make written application to the commissioner for a hearing thereon, provided, however, that the insurer or rating organization that uses such rate or made the filing shall not be authorized to proceed under this section. Such application shall specify the grounds to be relied upon by the applicant. If the commissioner shall find that the application is made in good faith, that the applicant would be so aggrieved if his grounds are established, and that such grounds otherwise justify holding such a hearing, he shall, within thirty (30) days after receipt of such application, hold a hearing upon not less than ten (10) days' written notice to the applicant and to every insurer and rating organization which uses such rate or made such filing; provided, however, if a public hearing had been held concerning such rate or filing before it became effective, no hearing shall be held pur-

suant to this section unless the commissioner shall find that there has been a substantial change of circumstances since such hearing.

If, after such hearing, the commissioner finds that the rate or filing does not meet the requirements of this chapter, he shall issue an order specifying in what respects he finds that such rate or filing fails to meet the requirements of this chapter, and stating when, within a reasonable period thereafter, such rate shall no longer be used or such filing shall be deemed no longer effective. Said order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in said order. If, however, the commissioner finds that an unfair discrimination exists in the application of a rate or filing to an individual risk he may, after a hearing held on like notice to the insurer affected and to any rating organization which made such filing, issue an order that such discrimination be removed. Copies of any order issued hereunder shall be sent to every such insurer and rating organization.

27-9-42. False or misleading information.—No person or organization shall wilfully withhold information from or knowingly give false or misleading information to the commissioner, to any statistical agency designated by the commissioner, to any rating organization, or to any insurer, which will affect the rates or premiums chargeable under this chapter. A violation of this section shall subject the one guilty of such violation to the penalties provided in §§27-9-45 and 27-9-46.

27-9-45. Penalty for violations.—Any person or organization wilfully violating any provision of this chapter shall, upon conviction thereof, be fined not less than one hundred dollars ($100) and not more than five hundred dollars ($500) for each such violation. Such penalty may be in addition to any other penalty provided by law.

27-9-46. Suspension or revocation of licenses.—The commissioner may suspend the license of any rating organization or insurer which fails to comply with an order of the commissioner within the time limited by such order, or any extension thereof which the commissioner may grant. The commissioner shall not suspend the license of any rating organization or insurer for failure to comply with an order until the time prescribed for an appeal therefrom has expired or, if an appeal has been taken, until such order has been affirmed.

The commissioner may determine when a suspension of license shall become effective and it shall remain in effect for the period fixed by him, unless he modifies or rescinds such suspension, or until the order upon which such suspension is based is modified, rescinded or reversed.

No license shall be suspended or revoked except upon a written order of the commissioner, stating his findings, made after a hearing held upon not less than ten (10) days' written notice to such person or organization specifying the alleged violation.

CHAPTER 29

Unfair Competition and Practices

27-29-1. Declaration of purpose.—The purpose of this chapter is to regulate trade practices in the business of insurance in accordance with the intent of congress as expressed in the act of congress of March 9, 1945 (public law 15, 79th congress) by defining—or providing for the determination of—all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

27-29-2. Definitions.—When used in this chapter:

(a) "Person" shall mean any individual, corporation, association, partnership, reciprocal exchange, interinsurer, Lloyds insurer, fraternal benefit society and any other legal entity engaged in the business of insurance, including agents, brokers and adjusters.

(b) "Commissioner" shall mean the insurance commissioner of this state.

27-29-3. Unfair methods of competition or unfair and deceptive acts or practices prohibited.—No person shall engage in this state in any trade practice which is defined in this chapter as—or determined pursuant to this chapter to be—an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

27-29-4. Unfair methods of competition and unfair or deceptive acts or practices defined.—The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

1. *Misrepresentations and false advertising of policy contracts.* Making, issuing, circulating or causing to be

made, issued or circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share of surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit or surrender his insurance.

2. *False information and advertising generally.* Making, publishing, disseminating, circulating or placing before the public or causing, directly or indirectly, to be made, published, disseminated, circulated or placed before the public in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business which is untrue, deceptive or misleading.

3. *Defamation.* Making, publishing, disseminating or circulating, directly or indirectly, or aiding, abetting or encouraging the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article of literature which is false or maliciously critical of or derogatory to the financial condition of an

insurer, and which is calculated to injure any person engaged in the business of insurance.

4. *Boycott, coercion and intimidation.* Entering into any agreement to commit—or by any concerted action committing—any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.

5. *False financial statements.* Filing with any supervisory or other public official, or making, publishing, disseminating, circulating or delivering to any person, or placing before the public or causing directly or indirectly to be made, published, disseminated, circulated, delivered to any person or placed before the public any false statement of financial condition of an insurer with intent to deceive.

Making any false entry in any book, report or statement of any insurer with intent to deceive any agent or examiner lawfully appointed to examine into its condition or into any of its affairs, or any public official to whom such insurer is required by law to report, or who has authority by law to examine into its condition or into any of its affairs, or with like intent wilfully omitting to make a true entry of any material fact pertaining to the business of such insurer in any book, report or statement of such insurer.

6. *Stock operations and advisory board contracts.* Issuing or delivering or permitting agents, officers or employees to issue or deliver agency company stock or other capital stock, or benefit certificates or shares in any common-law corporation, or securities of any special or advisory board contracts or other contracts of any kind promising returns and profits as an inducement to insurance.

7. *Unfair discrimination.* (a) Making or permitting any unfair discrimination between individuals of the same

class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract.

(b) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees or rates charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.

8. *Rebates.* (a) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of life insurance, life annuity or accident and health insurance, or agreement as to such contract other than as plainly expressed in the contract issued thereon, or paying or allowing or giving or offering to pay, allow or give directly or indirectly, as inducement to such insurance or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; or giving, selling or purchasing or offering to give, sell or purchase as inducement to such insurance or annuity or in connection therewith, any stocks, bonds or other securities of any insurance company or other corporation, association or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract.

(b) Nothing in clause "7" or paragraph "(a)" of clause "8" of this subsection shall be construed as including within the definition of discrimination or rebates any of the following practices:

(i) in the case of any contract of life insurance or life annuity, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from non-participating insurance, provided that any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders;

(ii) in the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount which fairly represents the saving in collection expense;

(iii) readjustment of the rate of premium for a group insurance policy based on the loss or expense experience thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year.

9. *Free choice of agent or insurer.* When any person, firm or corporation engaged in the business of lending money on the security of real or personal property, or in the business of negotiating, purchasing, selling or holding loans on the security of such property, or in the business of building, selling, or financing the sale or purchase of such property, or any trustee, director, officer, agent, or other employee of any such person, firm or corporation, requires that property insurance be procured for such property, the borrower, debtor or purchaser shall have free choice of agent and insurer through or by which such insurance is to be placed or written, subject only to the right of the builder, creditor, lender or seller (1) to require evidence, to be produced at a reasonable time prior to commencement or renewal [of] risk, that such insurance providing reasonable coverage has been obtained in an amount equal to the amount required by said builder, creditor, lender or seller;

(2) to require insurance in an insurer authorized to do business and having a licensed resident agent in this state; and (3) to refuse to accept insurance in a particular insurer on reasonable grounds related to solvency.

When any contractor or subcontractor is required to procure a surety bond or policy of insurance with respect to any building or construction contract which is about to be, or which has been bid or entered into, the contractor or subcontractor shall have free choice of agent and insurer through or by which such surety bond or insurance is to be written, provided, however, that the owner or contractor shall have the right (1) to require evidence, to be produced at a reasonable time prior to commencement or renewal [of] risk, that such insurance providing reasonable coverage has been obtained in an amount equal to the amount required by said builder, creditor, lender or seller; (2) to require insurance in an insurer authorized to do business and having a licensed resident agent in this state; and (3) to refuse to accept insurance in a particular insurer on reasonable grounds related to solvency, and, provided further, however, that the owner or contractor shall have the right to approve the form, sufficiency or manner of execution of the surety bond or policy or insurance furnished by the insurance company or agent selected by the contractor or subcontractor.

10. *Notice of free choice of agent or insurer.* Every debtor, borrower or purchaser of property with respect to which insurance of any kind on the property is required in connection with a debt or loan secured by such property or in connection with the sale of such property, shall be informed in writing by the builder, creditor, lender or seller, of his right of free choice in the selection of the agent and insurer through or by which such insurance is to be placed. There shall be no interference either directly or indirectly with such borrower's, debtor's or purchaser's free choice of an agent and of an insurer which complies

with the foregoing requirements, and the builder, creditor, lender, seller, owner or contractor shall not refuse the policy so tendered by the borrower, debtor, purchaser, contractor or subcontractor. Upon notice of any refusal of such tendered policy, the insurance commissioner shall order the builder, creditor, lender, seller, owner or contractor to accept the tendered policy, if he determines that such refusal is not in accordance with the foregoing requirements. Failure to comply with such an order of the insurance commissioner shall be deemed a violation of this section.

11. *Using insurance information to detriment of another.* Whenever the instrument requires that the purchaser, mortgagor or borrower furnish insurance of any kind on real property being conveyed or is collateral security to a loan, the mortgagee, vendor or lender shall refrain from disclosing or using any and all such insurance information to his or its own advantage and to the detriment of either the borrower, purchaser, mortgagor, insurance company or agency complying with the requirements relating to insurance.

27-29-4.1. Cancellation of insurance prohibited.—No insurance company authorized to do business in this state shall cancel or refuse to issue any type of insurance coverage for an owner occupied dwelling or personal property of every nature and description solely because of the area in which such property is situated.

27-29-4.2. Penalty.—For each violation of §27-29-4.1, the offening insurance company shall be fined a sum of five hundred dollars ($500) by the department of business regulation.

27-29-5. Hearings—Witnesses—Appearances—Production of books—Service of process.—(a) Whenever the insurance commissioner shall have reason to believe that any person engaged in the business of insurance in this state has been engaged or is engaging in this state in any unfair method of competition or any unfair or deceptive act or practice defined in §27-29-4, and that a proceeding by him in respect thereto would be to the interest of the public, he shall issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon requiring such person to appear in person at a time and place fixed in the notice which shall not be less than ten (10) days after the date of the service thereof, and notifying him of his right to be represented by counsel at such hearing.

(b) At the time and place fixed for such hearing, such person shall have an opportunity to be heard in person and by counsel, and to show cause why an order should not be made by the insurance commissioner requiring such person to cease and desist from the acts, methods or practices so complained of. Upon good cause shown the insurance commissioner shall permit any person to intervene, appear and be heard at such hearing by counsel or in person.

(c) The insurance commissioner upon such hearing shall cause to be made a stenographic record of all the evidence and all the proceedings had at such hearing, and shall, upon request, furnish a copy thereof to the person charged upon being reimbursed for the reasonable costs thereof. The insurance commissioner, upon such hearing, may administer oaths, examine and cross-examine witnesses, receive oral and documentary evidence, and shall have the power to subpoena witnesses, compel their attendance and require the production of books, papers, records, correspondence or other documents which are relevant to

the inquiry. In case of a refusal of any person to comply with any subpoena issued hereunder or of any witness to testify with respect to any matter concerning which he may be lawfully interrogated the superior court of Providence county, on application of the insurance commissioner, may issue an order requiring such person or witness to comply with such subpoena and/or to testify; and any failure to obey any such order of the court may be punished by the court as a contempt thereof; provided, however, that the person charged shall not be required to testify or produce books, papers, records, correspondence or other documents, tending to incriminate him, and his refusal to testify or produce books, papers, records, correspondence or other documents in such case shall not constitute contempt nor be the basis for an application by the insurance commissioner for an order requiring the person charged to testify or produce books, papers, records, correspondence or other documents; and provided further that a refusal of such person charged to testify or produce books, papers, records, correspondence or other documents shall be sufficient ground for the suspension or revocation of any license such person has under the insurance laws of this state in the discretion of the insurance commissioner.

(d) Statements of charges, notices, orders and other processes of the insurance commissioner under this chapter may be served by anyone duly authorized by the insurance commissioner, either in the manner provided by law for service of process in civil actions, or by registering and mailing a copy thereof to the person affected by such statement, notice, order or other process at his or its residence or principal office or place of business. The verified return by the person so serving such statement, notice, order or other process setting forth the manner of such service shall be proof of the same, and the return postcard receipt for such statement, notice, order or other process registered

and mailed as aforesaid shall be proof of the service of the same.

27-29-6. Cease and desist orders and modifications thereof.—(a) If after such hearing the insurance commissioner shall determine that the method of competition or the act or practice in question is defined in §27-29-4 and that the person complained of has engaged in such method of competition, act or practice in violation of this chapter, he shall reduce his findings to writing and shall issue and cause to be served upon the person charged with the violation an order requiring such person to cease and desist from engaging in such method of competition, act or practice.

(b) Until the expiration of the time allowed under §27-29-7(a) for filing a petition for review if no such petition has been duly filed within such time, the insurance commissioner may at any time upon such notice and in such manner as he shall deem proper, modify or set aside in whole or in part any order issued by him under this section.

(c) After the expiration of the time allowed for filing such a petition for review if no such petition has been duly filed within such time, the insurance commissioner may at any time, after notice and opportunity for hearing, re-open and alter, modify or set aside, in whole or in part, any order issued by him under this section whenever in his opinion conditions of fact or of law have so changed as to require such action or if the public interest shall so require.

27-29-7. Judicial review of cease and desist orders.—(a) Any person required by an order of the insurance commissioner under §27-29-6 to cease and desist from engaging in any unfair method of competition or any unfair or deceptive act or practice as defined may obtain a review of such order by filing in the superior court of Providence

county within twenty (20) days from the date of service of such order a written petition praying that the order of the insurance commissioner be set aside. A copy of such petition shall be forthwith served upon the insurance commissioner, and thereupon the insurance commissioner forthwith shall certify and file in such court his transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the insurance commissioner. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, shall determine whether the filing of such petition shall operate as a stay of such order of the insurance commissioner, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree modifying, affirming or reversing the order of the insurance commissioner, in whole or in part. The findings of the insurance commissioner as to the facts, if supported by the weight of the evidence, shall be conclusive.

(b) To the extent that the order of the insurance commissioner is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the insurance commissioner. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the insurance commissioner, the court may order such additional evidence to be taken before the insurance commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The insurance commissioner may modify his findings of fact, or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings which if supported by competent

evidence shall be conclusive, and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(c) A cease and desist order issued by the insurance commissioner under §27-29-6 shall become final—

1. Upon the expiration of the time allowed for filing a petition for review if no such petition has been duly filed within such time; except that the insurance commissioner may thereafter modify or set aside his order to the extent provided in §27-29-6(b); or

2. Upon the final decision of the court if the court directs that the order of the insurance commissioner be affirmed or the petition for review dismissed.

(d) No order of the insurance commissioner under this chapter or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this state.

27-29-8. Procedure as to unfair methods of competition and unfair or deceptive acts or practices which are not defined.—(a) Whenever the insurance commissioner shall have reason to believe that any person engaged in the business of insurance is engaging in this state in any method of competition or in any act or practice in the conduct of such business which is not defined in §27-29-4, that such method of competition is unfair or that such act or practice is unfair or deceptive and that a proceeding by him in respect thereto would be to the interest of the public, he may issue and serve upon such person a statement of the charge in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice. Each such hearing shall be conducted in the same manner as the hearing provided for in §27-29-5. The insurance commissioner shall

after such hearings make a report in writing in which he shall state his findings as to the facts, and he shall serve a copy thereof upon such person.

(b) If such report charges a violation of this chapter and if such method of competition, act or practice has not been discontinued, the insurance commissioner may—through the attorney general of this state—at any time after ten (10) days after the service of such report, cause a petition to be filed in the superior court of this state for the counties of Providence and Bristol to enjoin and restrain such person from engaging in such method, act or practice. The court shall have jurisdiction of the proceeding and shall have power to make and enter appropriate orders in connection therewith and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public pendente lite.

(c) A transcript of the proceedings before the insurance commissioner, including all evidence taken and the report and findings, shall be filed with such petition. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and there were reasonable grounds for the failure to adduce such evidence in the proceedings before the insurance commissioner, the court may order such additional evidence to be taken before the insurance commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The insurance commissioner may modify his findings of fact or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings with the return of such additional evidence.

(d) If the court finds that the method of competition complained of is unfair or that the act or practice com-

plained of is unfair or deceptive, that the proceeding by the insurance commissioner with respect thereto is to the interest of the public and that the findings of the insurance commissioner are supported by the weight of the evidence, it shall issue its order enjoining and restraining the continuance of such method of competition, act or practice.

27-29-9. Penalty.—Any person who violates a cease and desist order of the insurance commissioner under §27-29-6 after it has become final, and while such order is in effect, shall—upon proof thereof to the satisfaction of the court—forfeit and pay to the state of Rhode Island a sum not to exceed fifty dollars ($50), which may be recovered in a civil action except that, if such violation is found to be wilful, the amount of such penalty shall be a sum not to exceed five hundred dollars ($500).

27-29-10. Provisions of act additional to existing law.—The powers vested in the insurance commissioner by this chapter shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive.

27-29-11. Separability provision.—If any provision of this chapter, or the application of such provision to any person or circumstances shall be held invalid, the remainder of the chapter, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Title 42—State Affairs and Government

CHAPTER 14.1

DEPARTMENT OF
BUSINESS REGULATION—REGULATORY AUTHORITY
MEDICAL MALPRACTICE INSURANCE
(Enactment of January 12, 1976)
STATE OF RHODE ISLAND, &C.
In General Assembly

JANUARY SESSION, A.D. 1976

AN ACT

RELATING TO THE REGULATORY AUTHORITY OF THE DEPARTMENT BUSINESS REGULATION

It is enacted by the General Assembly as follows:

SECTION 1. Title 42 of the general laws, entitled "State Affairs and Government", is hereby amended by adding thereto the following chapter:

CHAPTER 14.1

Department of Business Regulation-Regulatory Authority-Medical Malpractice Insurance

42-14.1-1. Upon a finding by the Director of Business Regulation that there exists a lack of competitive, stable market for medical malpractice insurance in the State of Rhode Island and that as a consequence thereof, there is peril to the public health safety and welfare of the people of the State of Rhode Island, the Director is authorized to promulgate a regulation addressed to the solution of such problem which may encompass among others, the following provisions:

Medical Malpractice Insurance

A. Creation of a joint underwriting association consisting of all insurers authorized to write, within this state on a direct basis, personal injury liability insurance as defined in Title 27-9-2 of the General Laws of Rhode Island, including insurers covering such perils in multiple peril package policies. Every such insurer shall be a member of the Association and shall remain a member as a condition of its authority to continue to transact such kinds of insurance in this state.

B. To effectuate the purpose of the Association which is to provide on a temporary basis, a market for medical malpractice insurance on a self-supporting basis, the Association shall be the exclusive agency through which medical malpractice insurance may be written in this State on a primary basis for physicians. The Association shall be authorized to issue policies of medical malpractice insurance to hospitals and other health care providers, but need not be the exclusive agency through which such insurance may be written on a primary basis in this state.

C. Policies issued by the Association shall be subject to a group retrospective rating plan to be approved by the Director of Business Regulation and shall be calculated to be self-supporting.

D. The creation and administration of a stabilization reserve fund and initial policyholder contribution to such fund. The purpose of the Fund shall be the discharge when due of any retrospective premium charges payable by policyholders of the Association under the group retrospective rating plan authorized by regulation. Any monies remaining in the Fund after all such retrospective premium charges have been paid shall be returned to policyholders.

E. Upon certification by the Association to the Director that the estimated amount of any deficit remaining after the stabilization reserve fund has been exhausted in payment of the maximum final premium for all policyholders of the Association, the Director shall authorize members of the Association to commence recoupment by one of the following procedures:

a] applying a surcharge to be determined by the Association at a rate not to exceed one [1] percent of the annual premiums on future policies affording those kinds of insurance which form the basis for their participation in the Association, under procedures established by the Association or

b] deducting their share of the deficit from past or future taxes due the State of Rhode Island.

F. Organization of a plan of operation, use of policies written on a "claim made" or "occurrence basis", participation of members of the Association and all other powers necessary to effectuate the purposes of such regulation.

Section 2. This act validates Emergency Regulation XXI promulgated by the Department of Business Regulation on June 16, 1975, and further extends said regulation for an additional period of ninety [90] days, notwithstanding any other provision of law, or until such time as a permanent regulation is duly promulgated, whichever occurs first.

Section 3. This act shall take effect upon its passage.

CHAPTER 14.1

DEPARTMENT OF
BUSINESS REGULATION—REGULATORY AUTHORITY
MEDICAL MALPRACTICE INSURANCE
(As Amended May 14, 1976)

STATE OF RHODE ISLAND, &C.
In General Assembly

JANUARY SESSION, A.D. 1976

AN ACT

RELATING TO THE
REGULATORY AUTHORITY OF THE
DEPARTMENT OF BUSINESS REGULATION

*It is enacted by the General Assembly as follows:**

Section 1. Title 42 of the general laws entitled "State Affairs and Government", as amended by 76-H-7017 which became law on January 12, 1976, is hereby further amended as follows:

Chapter 14.1

Department of Business Regulation
Regulatory Authority
Medical Malpractice Insurance

42-14.1-1. • • •

A. • • •

B. To effectuate the purpose of the association which is to provide **on a temporary basis**, a market for medical malpractice insurance on a self-supporting

* Matter in Boldface deleted by the General Assembly; matter in italics added by the General Assembly.

basis, the association shall be **the exclusive agency through which medical malpractice insurance may be written in this state on a primary basis for physicans. The association shall be** authorized to issue policies of medical malpractice *and incidental liability* insurance to *phycians,* hospitals and other health care providers, but need not be the exclusive agency through which such insurance may be written on a primary basis in **this state.**

C. • • •
D. • • •
E. • • •
F. • • •

G. *Any joint underwriting association created pursuant to the authority granted in this chapter shall be exempt from taxation on gross premiums and stabilization reserve funds received for medical malpractice insurance as provided for in §44-17-1. This provision shall be applied retroactively to June 16, 1975, but in no way shall allow an exemption from taxation for premiums received other than for medical malpractice insurance.*

Section 2. • • •

Section 3. This act shall take effect upon its passage.

CHAPTER 35

Administrative Procedures

42-35-15. Judicial review of contested cases.—(a) Any person who has exhausted all administrative remedies available to him within the agency, and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. Any preliminary, procedural, or intermediate agency act or ruling is immediately reviewable in any case in which review of the final agency decision would not provide an adequate remedy.

(b) Proceedings for review are instituted by filing a complaint in the superior court of Providence county, or where expressly provided by the general laws in the sixth division of the district court, within thirty (30) days after mailing notice of the final decision of the agency or, if a rehearing is requested, within thirty (30) days after the decision thereon, provided, however, that any person who is aggrieved by a final decision concerning the assessment or determination of any tax, interest or penalty made by the tax administrator must pay the amount of such tax, interest or penalty to said administrator as a prerequisite to the filing of such complaint. Copies of the complaint shall be served upon the agency and all other parties of record in the manner prescribed by applicable procedural rules.

(c) The filing of the complaint does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.

(d) Within thirty (30) days after the service of the complaint, or within further time allowed by the court, the

agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings or decisions with the reviewing court.

(f) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the adminitsrative findings, inferences, conclusions, or decisions are:

(1) in violation of constitutional or statutory provisions;

(2) in excess of the statutory authority of the agency;

(3) made upon unlawful procedure;

(4) affected by other error of law;

(5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Title 39—Public Utilities and Carriers

39-3-13. Emergency suspension of rate schedules.—The said division shall have power, when deemed by it necessary to prevent injury to the business or interest of the people or any public utility of this state in case of any emergency to be judged of by the said division, to permit any public utility to temporarily alter, amend or suspend any existing rates, schedules and order relating to or affecting any public utility or part of any public utility in this state.

STATE OF RHODE ISLAND

DEPARTMENT OF BUSINESS REGULATION

INSURANCE DIVISION

[SEAL]

Emergency Regulation

XXI

Medical Malpractice Joint Underwriting
Association of Rhode Island

Effective June 16, 1975

Philip W. Noel, Governor

Robert E. Liguori, Director, Dept. of Business Regulation

Peter F. Mullaney, Insurance Commissioner

Emergency Regulation XXI

REGULATION XXI

MEDICAL MALPRACTICE JOINT UNDERWRITING ASSOCIATION OF RHODE ISLAND

Section 1. Statement of findings and purpose.

Section 2. Definitions.

Section 3. Temporary joint underwriting association.

Section 4. Plan of operation.

Section 5. Policy forms and rates.

Section 6. Stabilization reserve fund.

Section 7. Procedures.

Section 8. Participation.

Section 9. Directors.

Section 10. Appeals and judicial review.

Section 11. Annual Statements.

Section 12. Examinations.

Section 13. Privileged communications.

Section 14. Public officers or employees.

Section 15. Effective date and severability clause.

Emergency Regulation XXI

SECTION 1. STATEMENT OF FINDINGS AND PURPOSE.

The Director of Business Regulation hereby finds that:

1. There presently exists a lack of competitive stable market for medical malpractice insurance in the State of Rhode Island.

2. As a result, physicians and surgeons have manifested an intent to withhold all but emergency services commencing July 1, 1975.

3. There is a resulting potential endangerment to the continued financial integrity and existence of hospitals and other health care institutions in Rhode Island.

4. There is a peril to the entire health care delivery system in Rhode Island.

5. There is an imminent peril to the public health safety and welfare of the people of the State of Rhode Island.

6. There is an immediate need to provide a stable facility for medical malpractice insurance prior to July 1, 1975.

Therefore, in accordance with Title 42, Chapter 35, Section 3, of the General Laws of Rhode Island, there is hereby promulgated and adopted the following emergency regulations which shall be known as the Medical Malpractice Joint Underwriting Association of Rhode Island.

The basic purpose of this regulation is to provide for a temporary market to make the necessary medical malpractice insurance available for a period not to exceed two years. This will allow time for the Governor's commission on Medical Malpractice Reform to make its report, consideration of its recommendations and the enactment of any appropriate and necessary legislation.

Emergency Regulation XXI

SECTION 2. DEFINITIONS.

As used in this regulation:

1. "Association" means the temporary non exclusive joint underwriting association established pursuant to the provisions of this regulation.

2. "Medical Malpractice Insurance" means insurance coverage against the legal liability of the insured and against loss, damage, or expense incident to a claim arising out of the death or injury of any person as the result of negligence or malpractice in rendering professional service by any licensed physician, hospital or other licensed health care provider as defined in the General Laws of Rhode Island.

3. "Net direct premiums" means gross direct premiums written on personal injury liability insurance (as defined in Title 27-9-2 of the General Laws of Rhode Island) including the liability component of multiple peril package policies as computed by the Director of Business Regulation (hereinafter referred to as "Director"), less all premiums and dividends credited or returned to policyholders or the unused or unabsorbed portions of premium deposits.

SECTION 3. TEMPORARY EXCLUSIVE JOINT UNDERWRITING ASSOCIATION.

1. A temporary exclusive joint underwriting association is hereby created, consisting of all insurers authorized to write, within this state on a direct basis, personal injury liability insurance as defined in Title 27-9-2 of the General Laws of Rhode Island, including insurers covering such

perils in multiple peril package policies. Every such insurer shall be a member of the Association and shall remain a member as a condition of its authority to continue to transact such kinds of insurance in this state. An organizational meeting of the members of the Association shall be held at the Department of Business Regulation, 169 Weybosset Street, Providence, Rhode Island, at 10 a.m., on June 16, 1975.

2. The purpose of the Association shall be to provide, on a temporary basis, but in no event to exceed 12:01 a.m., July 1, 1977, a market for medical malpractice insurance on a self-supporting basis without subsidy from its members.

3. The Association shall commence underwriting operations for physicians, hospitals and other licensed health care providers within 5 days of approval by the Director of the plan of operation as set forth in Section 4 as hereinafter provided. The Association shall be the exclusive agency through which medical malpractice insurance may be written in this state on a primary basis for physicians. The Association shall be authorized to issue policies of medical malpractice insurance to hospitals and other licensed health care providers but need not be the exclusive agency through which such insurance may be written on a primary basis in this state.

4. If the Director, after a public hearing, determines at any time that medical malpractice insurance on a competitive basis can be made available in the voluntary market for either (i) physicians, (ii) hospitals, or (iii) any specific type of other licensed health care provider as defined in the General Laws of Rhode Island, the Association shall thereby cease its underwriting operations for such medical malpractice insurance which he has determined can be made available in the voluntary market.

5. The Association shall, pursuant to the provisions of this regulation and the plan of operation with respect to medical malpractice insurance, have the power on behalf of its members: (a) to issue, or to cause to be issued, policies of insurance to applicant including incidental coverages and subject to limits as specified in the plan of operation but not to exceed one million dollars for each claimant under one policy and three million dollars for all claimants under one policy in any one year; (b) to underwrite such insurance and to adjust and pay losses with respect thereto, or to appoint service companies to perform those functions; (c) to assume reinsurance from its members; and (d) to cede reinsurance.

6. The Association and its members are authorized and encouraged to cooperate with the Governor's Commission on Medical Malpractice Reform and the Association's actual or prospective policyholders on all matters pertaining to the commission's duties and the insurance issued or to be issued by the Association.

SECTION 4. PLAN OF OPERATION.

1. On or before the 25th of June, 1975, the directors of the Association shall submit to the Director for his review, a proposed plan of operation, consistent with the provisions of this regulation.

2. The plan of operation shall provide for economic, fair and non-discriminatory administration and for the prompt and efficient availability of medical malpractice insurance, and shall contain other provisions including, but not limited to preliminary assessment of all members for initial expenses necessary to commence operations, establishment of necessary facilities, management of the Asso-

ciation, assessment of members to defray losses and expenses, commission arrangements, reasonable and objective underwriting standards, acceptance and cession of reinsurance, appointment of servicing carriers or other servicing arrangements and procedures for determining amounts of insurance to be provided by the Association.

3. The plan of operation shall be subject to approval by the Director. If the Director disapproves all or any part of the proposed plan of operation, the directors shall within five (5) days submit for review an appropriate revised plan of operation or part thereof. If the directors fail to do so, the Director of Business Regulation shall promulgate a plan of operation or part thereof, as the case may be which shall become effective and operational upon his order.

4. Amendments to the plan of operation may be made by the directors of the Association, subject to the approval of the Director, or shall be made at the direction of the Director.

SECTION 5. POLICY FORMS AND RATES.

1. All policies issued by the Association shall provide for a continous period of coverage beginning with their respective effective dates and terminating automatically at 12:01 a.m. on July first, nineteen hundred seventy-seven unless sooner terminated in accordance with the provisions of this regulation. All such policies shall be issued subject to the group retrospective rating plan and the stabilization reserve fund authorized by this regulation. Policies may be written on a "claims made" or "occurrence" basis. No policy form shall be used by the Association unless it has been filed with the Director and either (a) he has approved it or (b) thirty days have elapsed and he has not disapproved it.

2. Cancellation of the Association's policies shall be governed by the General Laws of Rhode Island, except that the Association may also cancel any of its policies in the event of non-payment of any stabilization reserve fund charged by mailing or delivering to the insured at the address shown on the policy written notice stating when not less than ten days thereafter cancellation shall be effective.

3. The rates, rating plans, rating rules, rating classifications and territories applicable to the insurance written by the Association and statistics relating thereto shall be subject to Title 27, Chapter 9 of the General Laws of Rhode Island, giving due consideration to the past and prospective loss and expense experience for medical malpractice insurance written and to be written in this state, trends in the frequency and severity of losses, the investment income of the association, and such other information as the Director may require. All rates shall be on an actuarally sound basis, giving due consideration to the group retrospective rating plan and the stabilization reserve fund, and shall be calculated to be self-supporting. The Director shall take all appropriate steps to make available to the Association the loss and expense experience of insurers previously writing medical malpractice insurance in this state. To facilitate this procedure all claims will be reported with a duplicate copy to the Director of Business Regulation when reported to the servicing carrier or Association after July 1, 1975. Progress and Evaluation Reports will be submitted on a regular basis.

4. All policies issued by the Association shall be subject to a non-profit group retrospective rating plan to be approved by the Director under which the final premium for all policyholders of the Association, as a group, will be equal to the administrative expenses, loss and loss adjust-

ment expense and taxes, plus a reasonable allowance for contingencies and servicing. Policyholders shall be given full credit for all investment income, net of expenses and a reasonable management fee, on policyholder supplied funds. The standard premium (before retrospective adjustment) for each policy issued by the Association shall be established for portions of the policy period coinciding with the Association's fiscal year on the basis of the Association's rates, rating plan, rating rules, rating classifications and territories then in effect. The maximum final premium for all policyholders of the Association, as a group shall be limited as provided in paragraph 5 of Section 6 of this regulation. Since the business of the Association is subject to the non-profit group retrospective rating plan required by this regulation, there shall be a strong presumption that the rates filed and premiums for the business of the Association are not unreasonable or excessive.

5. The Director shall examine the business of the Association as often as he deems appropriate to make certain that the group retrospective rating plan is being operated in a manner consistent with this regulation. If he finds that it is not being so operated, he shall issue an order to the Association, specifying in what respects its operation is deficient and stating what corrective action shall be taken.

6. The Association shall certify to the Director the estimated amount of any deficit remaining after the stabilization reserve fund has been exhausted in payment of the maximum final premium for all policyholders of the association. Within sixty (60) days after such certification the Director shall authorize the members of the Association to commence recoupment of their respective shares of the deficit by one of the following procedures: (a) applying a surcharge to be determined by the Association at a rate not

to exceed one (1%) percent of the annual premiums on future policies affording those kinds of insurance which form the basis for their participation in the Association, under procedures established by the Association, or (b) deducting their share of the deficit from past or future taxes due the State of Rhode Island. The Association shall amend the amount of its certification of deficit to the Director as the values of its incurred losses become finalized and the members of the Association shall amend their recoupment procedure accordingly.

7. In the event that sufficient funds are not available for the sound financial operation of the Association, pending recoupment as provided in paragraph six of this section of this regulation, all members shall, on a temporary basis contribute to the financial requirements of the Association in the manner provided for in section eight. Any such contribution shall be reimbursed to the members by recoupment as provided in paragraph six of this section.

SECTION 6. STABILIZATION RESERVE FUND.

1. There is hereby created a stabilization reserve fund. The fund shall be administered by three directors, one of whom shall be the Director of Business Regulation or his deputy. The remaining two directors shall be appointed by the Director of Business Regulation. One shall be a representative of the Association; the other a representative of its policyholders.

2. The directors shall act by majority vote with two directors constituting a quorum for the transaction of any business or the exercise of any power of the fund. The directors shall serve without salary, but each director shall be reimbursed for actual and necessary expenses incurred in the performance of his official duties as a director of the

fund. The directors shall not be subject to any personal liability or accountability with respect to the administration of the fund.

3. Each policyholder shall pay to the Association initially a stabilization reserve fund charge equal to one third of the first annual premium payment due for the insurance through the Association. Such charge shall be separately stated in the policy. The Association shall cancel the policy of any policyholder who fails to pay the stabilization reserve fund charge.

4. The Association shall promptly pay to the trustee of the fund all stabilization reserve fund charges which it collects from its policyholders and any retrospective premium refunds payable under the group retrospective rating plan authorized by this regulation.

5. All monies received by the fund shall be held in trust by a corporate trustee selected by the directors. The corporate trustee may invest the monies held in trust, subject to the approval of the directors. All investment income shall be credited to the fund. All expenses of administration of the fund shall be charged against the fund. The monies held in trust shall be used solely for the purpose of discharging when due any retrospective premium charges payable by policyholders of the Association under the group retrospective rating plan authorized by this regulation. Payment of retrospective premium charges shall be made by the directors upon certification to them by the Association of the amount due. Any monies remaining in the fund after all such retrospective premium charges have been paid shall be returned to policyholders under procedures authorized by the directors.

SECTION 7. PROCEDURES.

1. Any licensed physician, hospital or other licensed health care provider shall, on or after the effective date

of the plan of operation, be entitled to apply to the Association for such coverage. Such application may be made on behalf of an applicant by a broker or agent authorized by the applicant.

2. If the Association determines that the applicant meets the underwriting standards of the Association as prescribed in the plan of operation and there is no unpaid, uncontested premium due from the applicant for prior insurance (as shown by the insured having failed to make written objection to premium charges within thirty (30) days after billing) then the Association, upon receipt of the premium, or such portion thereof as is prescribed in the plan of operation, shall cause to be issued a policy of medical malpractice insurance.

SECTION 8. PARTICIPATION.

1. All insurers which are members of the Association shall participate in its writings, expenses, servicing allowance, management fees and losses in the proportion that the net direct premiums of each such member (excluding that portion of premiums attributable to the operation of the Association) written during the preceding calendar year bears to the aggregate net direct premiums written in this state by all members of the Association. Each insurer's participation in the Association shall be determined annually on the basis of such net direct premiums written during the preceding calendar year, as reported in the annual statements and other reports filed by the insurer with the Director.

SECTION 9. DIRECTORS.

The Association shall be governed by a board of eleven directors, to be elected annually. Eight directors shall be elected by cumulative voting by the members of the Asso-

citation, whose votes in such election shall be weighted in accordance with each member's net direct premiums written during the preceding calendar year. Three directors shall be appointed by the Director of Business Regulation as representatives of the medical profession. The eight member companies serving on the first board shall be elected at the organizational meeting of the members to be held on June 16, 1975, at 10 a.m. The Director shall appoint the other three directors serving on the first board on or before the date of such meeting.

SECTION 10. APPEALS AND JUDICIAL REVIEW.

1. Any applicant to the Association, or any person insured pursuant to this regulation, or their representatives, or any affected insurer, may appeal to the Director within thirty (30) days after any ruling, action or decision by or on behalf of the Association, with respect to those items the plan of operation defines as appealable matters.

2. All orders of the Director made pursuant to this regulation shall be subject to judicial review as provided in the General Laws of Rhode Island, Title 42-35-15.

SECTION 11. ANNUAL STATEMENTS.

The Association shall file in the office of the Director annually on or before the first day of March, a statement which shall contain information with respect to its transactions, condition, operations and affairs during the preceding year. Such statement shall contain such matters and information as are prescribed and shall be in such form as is approved by the Director. The Director may, at any time, require the Association to furnish additional information with respect to its transactions, conditions or any matter connected therewith considered to be material and of assistance in evaluating the scope, operation and experience of the Association.

SECTION 12. EXAMINATIONS.

The Director shall make an examination into the affairs of the Association at least annually. Such examination shall be conducted and the report thereon filed, and expenses of every such examination shall be borne and paid by the Association in the manner prescribed by Title 27-9-36 of the General Laws of Rhode Island.

SECTION 13. PRIVILEGED COMMUNICATIONS.

There shall be no liability on the part of, and no cause of action of any nature shall arise against the Association, the Director or his authorized representatives or any other person or organization, for any statements made in good faith by them during any proceedings or concerning any matters within the scope of this regulation.

SECTION 14. PUBLIC OFFICERS OR EMPLOYEES.

No member of the board of directors of the stabilization reserve fund who is otherwise a public officer or employee shall suffer a forfeiture of his office or employment of any loss or diminution in the rights and privileges appertaining thereto, by reason of membership on the board of directors of the stabilization reserve fund.

SECTION 15. EFFECTIVE DATE—SEVERABILITY CLAUSE.

This emergency regulation shall take effect June 15, 1975, at 12:01 a.m.

If any provision of this regulation, or the application thereof to any person or circumstance, is held invalid, such invalidity shall not affect other provisions or applications of this regulation which can be given effect without the invalid provision or application, and to that end the provisions of this regulation are severable.

ROBERT E. LIGUORI
Director of Business Regulation

MEDICAL MALPRACTICE JOINT UNDERWRITING ASSOCIATION OF RHODE ISLAND

ARTICLE I

Plan of Operation

Section 1. *Purpose.* The purpose of the Plan is to implement Emergency Regulation XXI of the State of Rhode Island Department of Business Regulation Insurance Division issued pursuant to Title 42, Chapter 35, Section 3, General Laws of Rhode Island, creating a Temporary Joint Underwriting Association to provide medical malpractice insurance for licensed physicians, hospitals and other licensed health care providers, on a self-supporting basis without subsidy from its members.

Section 2. *Definitions.* As used in this Plan:

(a) "Association" means the Temporary Joint Underwriting Association established pursuant to Emergency Regulation XXI of the State of Rhode Island Department of Business Regulation Insurance Division under Section 4 of this Plan.

(b) "Board" means the Board of Directors of the Temporary Joint Underwriting Association as determined and constituted under Section 5 of this Plan.

(c) "Director" means the Director of Business Regulation.

(d) "Medical Malpractice Insurance" means insurance coverage against the legal liability of the insured and against loss, damage, or expense incident to a claim arising out of the death or injury of any person as the result of negligence or malpractice in rendering professional service by any licensed physician, hospital or other licensed health care provider.

(e) "Member" means every insurer required to be a member of the Association.

(f) "Net direct premiums" means gross direct premiums written on personal injury liability insurance as defined in Title 27-9-2, General Laws of Rhode Island, including the liability component of multiple peril package policies as computed by the Director, less all premiums and dividends credited or returned to policyholders or the unused or unabsorbed portion of premium deposits. Reinsurance assumed or ceded shall not be included.

Section 3. *Effective Date and Duration of Plan.*

(a) This Plan shall take effect upon approval by the Director and shall function for a period not to exceed 12:01 a.m., July 1, 1977. Expiration of the Plan on such date will not relieve the Association of liability for coverage assumed prior to such date.

(b) If the Director, after a public hearing, determines at any time that medical malpractice insurance on a competitive basis can be made available in the voluntary market for either (i) physicians, (ii) hospitals, or (iii) any specific type of other licensed health care provider as defined in the General Laws of Rhode Island, the Association shall thereby cease its underwriting operations for such medical malpractice insurance which the Director has determined can be made available in the voluntary market.

Section 4. *Temporary Joint Underwriting Association.*

(a) Every insurer authorized to write, within the State of Rhode Island on a direct basis, personal injury liability insurance as defined in Title 27-9-2, General Laws of Rhode Island, including insurers covering such perils in multiple peril package policies, shall be a member of the Association and shall remain a member as a condition of its authority to continue to transact such kinds of insurance in this State. Each such insurer shall be bound by this Plan.

(b) Every member of the Association shall participate in its writings, expenses, servicing allowances, management fees and losses in the proportion that the net direct premiums of each such member, excluding that portion of premiums attributable to the operation of the Association, written during the preceding calendar year bears to the aggregate net direct premiums written in Rhode Island by all members of the Association. Each member's participation in the Association shall be determined annually on the basis of such net direct premiums written during the preceding calendar year, as reported in the annual statements and other reports filed by the member with the Director.

(c) An insurer ceasing to be licensed or authorized as specified in Subsection (a) of this section shall automatically cease to be a member of this Association effective on the day following the termination or expiration of its authority and shall no longer be bound by this Plan; provided, however, such insurer shall remain liable for any liabilities arising from its participation in the Plan prior to the termination or expiration of such authority.

(d) In the event of the failure of any member, through insolvency or otherwise, to meet liabilities resultant from its participation in the Plan after the Board shall have made written demand upon it to do so, the Board shall report the delinquency to the Director for appropriate action. If they continue beyond a reasonable period of time such liabilities will be assumed by the remaining members, upon appropriate notification by the Board, each taking its proportionate share thereof as determined by the Board. The Association shall be subrogated to the rights of the remaining members in any liquidation proceeding or action against the insolvent or defaulting member and shall have full authority on their behalf to exercise such rights in any action or proceeding.

(e) The Association shall be the exclusive agency through which medical malpractice insurance may be written in Rhode Island on a primary basis for physicians. The Association is authorized to issue policies of medical malpractice insurance to hospitals and other licensed health care providers but need not be the exclusive agency through which such insurance may be written on a primary basis in Rhode Island.

(f) The Association shall, pursuant to Emergency Regulation XXI and this Plan of Operation with respect to medical malpractice insurance, have the power, on behalf of its members:

(1) to issue, or to cause to be issued, policies of insurance to applicants, including incidental coverages and subject to limits not to exceed one million dollars ($1,000,000) for each claimant under one policy and three million

dollars ($3,000,000) for all claimants under one policy in any one year;

(2) to underwrite such insurance and to adjust and pay losses with respect thereto, or to appoint service companies to perform these functions;

(3) to assume reinsurance from its members; and

(4) to cede reinsurance.

Section 5. *Administration of the Plan.*

(a) The Association shall be governed by a Board of Directors which shall administer this Plan.

(b) The Board shall consist of eleven (11) members, as follows:

(1) Eight (8) insurers elected annually by cumulative voting by the members of the Association whose votes in such election shall be weighted in accordance with each member's net direct premiums written during the preceding calendar year.

(2) Three (3) representatives of the medical profession appointed by the Director.

(c) Not more than one (1) insurer in a group under the same management or ownership shall serve on the Board at the same time.

(d) Any vacancy on the Board shall be filled in the following manner:

(1) If the vacancy is that of an insurer, by a special election called by the Board.

(2) If the vacancy is that of a representative of the medical profession, by appointment by the Director.

(e) A chairman and other officers, as deemed necessary, shall be elected by the Board from among Board members.

(f) At any meetings of the Board, each director shall have one (1) vote. Eight (8) members of the Board shall constitute a quorum for the transaction of business and the acts of a majority of the directors present at a meeting at which a quorum is present shall be the acts of the Board. Voting by proxy on matters which come before the Board shall be permitted, but proxies shall not be permitted in a determination as to whether a quorum is present.

(g) Members of the Board shall receive reimbursement from the Association for their actual and necessary expenses incurred in attending Board meetings and in performing Association business.

Section 6. *Duties and Powers of the Board.*

(a) The Board shall meet as often as may be required to perform the general duties of administration of the Plan. It shall annually file in the office of the Director on or before the first day of March, a statement in the form prescribed by the Director, which shall contain information with respect to the Association's transactions, condition, operations and affairs during the preceding year and it shall furnish to the Director, as he may at any time require, such additional information as would be considered to be material and of assistance in eval-

uating the scope, operation and experience of the Association. Copies of such reports filed with the Director shall be furnished to all members of the Association.

(b) The Board shall have the power on behalf of the Association to:

(1) Make a preliminary assessment of all members of the Association for initial expenses necessary to commence operation of the Plan;

(2) Contract as necessary to provide space, equipment and services to accomplish the Association's purposes;

(3) Appoint and contract for one or more insurers and/or service companies able and willing to provide policy service and claim service on behalf of all other members of the Association. The Board shall provide for the establishment of the scope, terms, standards and compensation applicable to the services to be provided;

(4) A retrospective plan will be established by the Board to allow for possible return of premium to the Health Care Providers or additional assessment if necessary and to attempt to procure reinsurance to cover this eventuality of the cost which will be borne by the stabilization fund;

(5) Establish the commissions payable on business written by the Association;

(6) Provide for statistical coding of insurance written by the Association so that appropriate records may be compiled for the purpose of calculating the adequate premium level for each classification of risk and for studies of the operation of the Plan;

(7) Invest and disburse Association funds and budget expenses;

(8) Collect the Stabilization Reserve Fund charges and pay such charges for the trustees of the Fund in accordance with Section 6, Items 3 & 4 of Emergency Regulation XXI;

(9) Open bank accounts for use in Association business. Reasonable delegation of deposit and withdrawal authority to such accounts for Association business may be made consistent with prudent fiscal authority;

(10) Establish rules for the accounting, collection and disbursement of all premiums;

(11) Make such additional assessments against members of the Association as may be deemed necessary to defray losses and expenses;

(12) Provide for the filing of rules, rates and forms with the Director;

(13) Provide rules of procedure governing the placement of insurance with the Association;

(14) Establish reasonable and objective underwriting standards business placed with the Association;

(15) Provide for such fidelity and surety bonds and such insurance as may be necessary to transact the business of the Association;

(16) Establish an operating Committee and such other committees may be necessary to facilitate the administration of the Plan; and

(17) Review, consider and act on any matters deemed by it to be necessary and proper for the administration of the Plan.

Section 7. *Appeals.* Any applicant to the Association or any person insured thereby, or their representatives or any affected insurer aggrieved with respect to any ruling, action or decision of the Board, or the Association, or any Committee thereof, may within thirty (30) days following such ruling, action, or decision, make appeal to the Director. All orders of the Director made respecting such appeal shall be subject to judicial review as provided in Title 42-35-15, General Laws of Rhode Island.

Section 8. *Plan Amendments.* The Board may recommend and the members of the Association may amend the Plan. Any proposed amendment to the Plan by the Association shall be submitted to the Director for his formal approval unless such proposed amendment, after review by the members of the Association, is disapproved by ten (10) percent or more of such members, provided such dissenting members write at least twenty (20) percent of all the insurance in the state subjecting them to mandatory membership in this Plan. Notice of any proposed amendment by the Association shall be mailed to members by the Board not less than twenty (20) days prior to the final date fixed for voting thereon.

Section 9. *Meetings of the Members.*

(a) A regular meeting of the members shall be held annually on such date, at such place within the State or such other location approved by the Board and at such hour as may be designated by the Board.

(b) Special meetings may be called at any time by the Chairman of the Board. A special meeting shall be called by the Chairman of the Board whenever requested in writing by members whose net direct premiums equal 20% or more of the net direct premiums of all members in the most recent calendar year. Notices of special meetings shall state the purposes thereof. No action shall be taken at a special meeting for a purpose not stated in the notice of meeting except by a majority vote of the entire membership.

(c) Notices of all regular and special meetings shall be sent to each person serving as a representative on the Operating Committee or a Subcommittee of the Operating Committee and to the Director. Each notice shall state the purpose of the meeting and include any proposed changes in rules or procedures.

(d) Notice of each meeting of the members of the Association shall be given at least 10 days prior to the date of the meeting by ordinary mail to each member at its office address according to the records of the Association, except that notice of a meeting to amend the Plan shall be given in the manner provided in Section 8. Notices of meetings to amend the Plan shall include the proposed amendments. The time of all notices shall run from the date of mailing the notice.

(e) Members present in person or proxy and representing 51 percent or more of the members shall constitute a quorum at any meeting of the Asso-

ciation. Except as otherwise provided in Subsection (b) of this Section, when a quorum is present a proposition shall be carried by a majority of the votes cast in person and by proxy.

Section 10. *Indemnification.*

(a) Any person or member made or threatened to be made a party to any action, suit or proceeding, because such person or member served on the Board or on a committee of the Association or was an officer or employee of the Association or as the employee of a servicing carrier and/or servicing company shall be indemnified by the Association against all judgments, fines, amounts paid in settlement, reasonable costs and expenses including attorney's fees and any other liabilities that may be incurred as a result of such action, suit or proceeding, or threatened action, suit or proceeding. Such indemnification shall not be provided in relation to matters as to which such person or member shall be adjudged in such action, suit or proceeding to be liable by reason of breach of duty involving gross negligence, bad faith, dishonesty, willful misfeasance or reckless disregard of the responsibilities in the performance of such person or member's duties or obligations to the Association. With respect to any criminal actions or proceedings indemnification shall only be provided when such person or member had reasonable cause to believe that his or its conduct was lawful. Such indemnification shall be provided whether or not such person or member is a member or is holding office or is employed at the time of such action, suit or proceeding and whether or not any such liability is incurred prior to the adoption of this Plan. Such indemnification shall not be exclusive

of other rights such person or member may have and shall extend to the successors, heirs, executors or administrators of such person or member. In the event of settlement or other termination of a matter before final adjudication, indemnification shall be provided only if the Board is advised by independent counsel that the person or member to be indemnified did not in counsel's opinion commit such breach of duty.

(b) In each instance in which a question of indemnification arises, entitlement thereto, pursuant to the conditions set forth in Subsection (a) of this Section, shall be determined by the Board which shall also determine the time and manner of payment of such indemnification; provided, however, that a person or member who or which has been wholly successful, on the merits or otherwise, in the defense of a civil or criminal action, suit or proceeding of the character described in the Subsection (a) of this Section, shall be entitled to indemnification as authorized in such Subsection. Nothing herein shall be deemed to bind a person or member who or which the Board has determined not be entitled to indemnification, or to preclude such person or member from asserting the right to such indemnification by legal proceedings. Such indemnification as is herein provided shall be apportioned among all members, including any named in any such action, suit or proceeding, pursuant to this Plan.

Section 11. *Records, Audits and Reports.*

(a) The books of account, records, reports and other documents of the Association shall be open and free for examination to the Director at all reasonable hours.

(b) The books of account, records, reports and other documents of the Association shall be open to inspection by all other persons including members only at such times and under such conditions and regulations as the Board shall determine.

(c) The Association shall provide for the making of detailed reports of liability assumed or cancelled, for the drawing up of annual budgets of the Association and for the rendering of accounts to each member at least every twelve months during the continuance of membership.

(d) The books of account of Servicing Carriers and/or Servicing Companies may be audited by a firm of independent auditors designated by the Board.

(e) The Association may audit the records of any member relating to the subject matter of the Plan of Operation and may by rule establish what policies, records, books of account, documents and related material it deems necessary to carry out its functions. Such material shall be provided by the members in the form and with the frequency reasonably required by the Association.

Section 12. *Examinations.* The Director shall make an examination into the affairs of the Association at least annually. Such examination shall be conducted and the report thereon filed, and expenses of every such examination shall be borne and paid by the Association in the manner prescribed by Title 27-9-36 of the General Laws of Rhode Island.

Section 13. *Privileged Communications.* There shall be no liability on the part of, and no cause of action of any nature shall arise against the Association, the Director or his authorized representatives or any other person or organization, for any statements made in good faith by them during any proceedings.

MEDICAL MALPRACTICE JOINT UNDERWRITING ASSOCIATION OF RHODE ISLAND

ARTICLE II

Operating Principles

Section 1. *Definitions.* The definitions in Article I, Section 2, apply also to this Article.

In this article the terms "carrier" and "servicing carrier" means servicing carriers and/or servicing companies.

Section 2. *Eligibility of Applicants.*

(a) Any licensed physician, hospital or other licensed health care provider in the State of Rhode Island on or after the date the Plan becomes effective shall be entitled to apply to the Association for medical malpractice insurance. Such application may be made on behalf of an applicant by a broker or agent authorized by the applicant.

(b) If the Association determines that the applicant meets the underwriting standards of the Association as provided in Article III, Rules of Practice, it shall, upon receipt of the premium or such portion thereof as is prescribed in Article III, Rules of Practice, cause to be issued a policy of medical malpractice insurance to such applicant.

(c) Eligibility of applicants for medical malpractice insurance in the Association shall cease whenever the Director, after a public hearing, determines that medical malpractice insurance on a competitive basis can be made available in the voluntary market for either physicians, hospitals or other licensed health care providers, as provided in Article I, Section 3(b).

Section 3. *Participation Ratios.* For the purpose of establishing a basis for allocation of Association expenses and losses as a result of participation requirements reflected in Article I, Section 4(b), each member of the Association shall report statistical information as required by Article III, Rules of Practice, to the Association or permit its statistical agencies, designated by the member, to report the statistical information to the Association.

Section 4. *Member Termination.* For the purpose of further implementing the provisions of Article I, Section 4(c), liabilities of a terminating insurer may be assumed by another insurer under the following circumstances:

(a) when the personal injury liability insurance business of the terminating insurer has been purchased by, transferred to or reinsured totally by such other insurer, and

(b) when the terminating insurer is merged into or consolidated with such other insurer which is to be the continuing insurer.

A purchasing or continuing insurer, however, may be relieved of its obligations for the liabilities of a terminating insurer if another insurer has agreed in a manner satisfactory to the Board to assume such obligations.

Section 5. *Servicing Carriers.*

(a) *Eligibility Requirements.* In selecting carriers, the Board must give consideration to the following:

(1) The carriers must be authorized by the Director and be operating statewide in Rhode Island having reasonable expertise and capability of properly underwriting and process-

ing medical malpractice insurance in the state, properly servicing claims thereon and otherwise maintaining a level of service for all risks submitted through agents or brokers equal to that rendered in the voluntary market.

(2) The carrier must have the necessary facilities in Rhode Island to provide Association risks with the same level of service rendered to its voluntary market. If a carrier normally services its Rhode Island voluntary market from a policy service facility not physically located in Rhode Island, it will not be disqualified to act as a servicing carrier provided its servicing of Association business is maintained at the same level as its voluntary business.

(3) A carrier applying to the Board to be a servicing carrier will be required to estimate any start-up and shut-down expense. It will be the responsibility of the Board to make judgments as to what costs are extraordinary and to give due consideration to any extraordinary expense reimbursement applied for or expected.

(b) *Service Standards.* A servicing carrier must:

(1) accomplish confirmation of classifications and territories by the use of classification checks, credit reports, or other appropriate means and must properly underwrite and rate risks;

(2) issue policies to applicants by the expiration date of 30-day binders;

(3) have the ability to carry out all subsequent policy transactions and servicing of claims on a timely basis;

(4) have the ability to carry out all necessary accounting procedures, including, but not limited to (i) Billing and Collection and (ii) Commission payments and statements to producers;

(5) have the ability to collect the necessary data to disburse commission payments to agents and have the ability to store this data and report same to the Internal Revenue Service, if required; and

(6) generate the statistical and accounting information in report format required under Article III, Rules of Practice.

(c) *Allowances.* A servicing carrier will be reimbursed for Association business on the following basis:

(1) Hospital—six percent (6%) of written premium for operating costs, including loss prevention and inspection services, excluding claim expense.

Physicians—four percent (4%) of written premium for operating costs, excluding claim expense.

All other licensed health care providers—either of the percentage expressed above depending upon the category—either hospital or physicians—within which they fall most closely.

(2) A service fee of one percent (1%) of written premium.

(3) Allocated Loss Adjustment Expense shall be charged against the Association as part of the incurred loss.

(4) Unallocated Loss Adjustment Expense shall be charged at an amount equal to ten percent (10%) of the sum of the reported losses incurred plus the Allocated Loss Adjustment Expense.

(5) The Board in its sole discretion may offer or allow a servicing carrier reimbursement in whole or in part for specific extraordinary expense incurred in qualifying for continuing as or ceasing to be a servicing carrier. Such expense must be explained and supported in such detail as required by the Board, must be in its judgment significantly in excess of the normal additional expense expected to be incurred and must actually be incurred before reimbursement.

(6) The Board in its sole discretion may authorize reimbursement of servicing carriers for normal insurance business losses incurred in connection with Association business. Such normal business losses shall be as determined by the Board but shall not include any loss or expense incurred as a result of fraud or dishonesty on the part of a servicing carrier's personnel (including but not limited to independent adjusters and agents), and each servicing carrier shall hold the Association harmless from and reimburse it for any such loss or expense charged to the Association.

(d) *Extrahazardous Risks.* If an applicant presents a risk which is greater than that contemplated by the rate normally applicable, the servicing carrier shall consult with the Board before submission to the Director for an increase in such rate. An increase in rate approved by the Director shall be deemed to include any applicable additional charge.

(e) *Appointment of Agents; Commissions.*

(1) Every agent licensed to solicit personal injury liability insurance in the State of Rhode Island shall be eligible for appointment to a servicing carrier upon application to the Association. Individual agents who are part of an agency entity may be appointed to one servicing carrier.

(2) A 5% commission per policy is payable to the producing agent.

Section 6. *Amendments.* No amendment of this Article by the Board shall be effective unless sixty (60) days prior notice in writing of the amendment and the reasons therefor shall have been given Association members, unless after such notice an earlier effective date is ratified by majority vote of the members. If a special meeting of the members is called pursuant to Part I, Section 9(b), to consider the amendment, the proposed amendment shall not be effective until after such meeting. Any such amendment shall be subject to the approval of the Director.

STATE OF RHODE ISLAND

DEPARTMENT OF BUSINESS REGULATION

INSURANCE DIVISION

Regulation XXI

Medical Malpractice Joint Underwriting Association
of Rhode Island

Effective April 9, 1976

PHILIP W. NOEL, Governor

Robert E. Liguori,
Director, Department of Business Regulation

SECTION 1. *Statement of Findings and Purpose.*

The Director of Business Regulation hereby finds that:

1. There has existed a lack of a competitive stable market for medical malpractice insurance in the State of Rhode Island for providers of health care.

2. As a result, Emergency Regulation XXI was promulgated on June 16, 1975, to provide a stable facility for medical malpractice insurance in Rhode Island, which regulation expires at 12:00 midnight April 8, 1976.

3. Medical malpractice insurance has not been made reasonably available on a competitive stable basis for a significant majority of any class, type or group of providers of health care in the voluntary market which has resulted in a peril to the health care delivery system in Rhode Island and to the public health, safety and welfare of the people of the State of Rhode Island.

4. There is a need to provide a continuing stable facility for medical malpractice insurance prior to April 9, 1976.

Therefore, in accordance with Title 42, Chapter 14.1, of the General Laws of Rhode Island, there is hereby promulgated and adopted the following regulation which shall be known as the Medical Malpractice Joint Underwriting Association of Rhode Island.

The basic purpose of this regulation is to provide for medical malpractice insurance in Rhode Island.

SECTION 2. *Definitions.*

As used in this regulation:

1. "Association" means the Joint Underwriting Association established pursuant to the provisions of this regulation.

2. "Medical Malpractice Insurance" means insurance coverage against the legal liability of the insured and against loss, damage, or expense incident to a claim arising out of the death or injury of any person as the result of negligence or malpractice in rendering or failing to render professional service by any provider of health care.

3. "Provider of Health Care" means (a) any licensed physician, hospital or other licensed health care provider as defined in the General Laws of Rhode Island; and (b) any other group, type or category of individual or health related facility that the Director determines, with or without a hearing, to be necessary for the continued delivery of health care in Rhode Island.

4. "Incidental coverage" means any other type of liability insurance covering activities directly related to the continued and efficient delivery of health care that would normally be available and underwritten under a comprehensive general liability form of insurance, except liabilities that may arise out of the ownership or use of any motor vehicles and workers compensation insurance.

5. "Net direct premiums" means gross direct premiums written on personal injury liability insurance (as defined in Title 27-9-2 of the General Laws of Rhode Island) including the liability component of multiple peril

package policies as computed by the Director, less all premiums and dividends credited or returned to policyholders or the unused or unabsorbed portions of premium deposits.

6. "Director" means the Director of Business Regulation of the State of Rhode Island.

SECTION 3. *Joint Underwriting Association.*

1. A Joint Underwriting Association is hereby created, consisting of all insurers authorized to write, within this state on a direct basis, personal injury liability insurance as defined in Title 27-9-2 of the General Laws of Rhode Island, including insurers covering such perils in multiple peril package policies. Every such insurer shall be a member of the Association and shall remain a member as a condition of its authority to continue to transact such kinds of insurance in this State.

2. The purpose of the Association shall be to continue to provide a market for medical malpractice insurance on a self-supporting basis.

3. The Association shall continue to underwrite medical malpractice insurance without interruption under the programs approved under Emergency Regulation XXI, including all policies and obligations assumed thereunder. The Association shall also be authorized to underwrite incidental coverages for any provider of health care but only if such provider of health care shall be insured by the Association for medical malpractice.

4. The Association shall be the exclusive agency through which medical malpractice insurance may be written in this state on a primary basis for physicians but need not be the

exclusive agency through which medical malpractice insurance may be written in this state for all other providers of health care. In the event, however, that legislation is enacted amending Title 42-14.1-1 removing the requirement that the Association be the exclusive agency for medical malpractice insurance for physicians, then the Association need not be the exclusive agency for such insurance, and any insurers authorized to write medical malpractice insurance in this State shall be allowed to do so subject to the provisions of Title 27, Chapter 9 of the General Laws of Rhode Island.

5. The Association shall, pursuant to the provisions of this regulation and the plan of operation with respect to medical malpractice insurance, have the power on behalf of its members: (a) to issue, or to cause to be issued, policies of insurance to applicants, including incidental coverages and subject to limits as specified in the plan of operation but not to exceed one million dollars for each claimant under one policy in any one year and three million dollars for all claimants under one policy in any one year; (b) to underwrite such insurance and to adjust and pay losses with respect thereto, or to appoint service companies to perform those functions; (c) to assume reinsurance from its members; and (d) to reinsure its risks in whole or in part.

SECTION 4. *Plan of Operation.*

1. The plan of operation of the Association submitted to the Director under the Emergency Regulation shall stand as approved for the Association and shall serve as the accepted plan for the purpose of this regulation subject to Section 9 of this regulation relating to directors.

2. The plan of operation shall continue to provide for economic, fair and non-discriminatory administration and

for the prompt and efficient availability of medical malpractice insurance and incidental coverages and shall contain other provisions including, but not limited to, preliminary assessment of all members for initial expenses necessary to commence operations, establishment of necessary facilities, management of the Association, assessment of members to defray losses and expenses, commission arrangements, reasonable and objective underwriting standards, acceptance and cession of reinsurance, appointment of servicing carriers or other servicing arrangements and procedures for determining amounts of insurance to be provided by the Association.

3. Amendments to the plan of operation may be made by the directors of the Association, subject to the approval of the Director, or shall be made at the direction of the Director.

SECTION 5. *Policy Forms and Rates.*

1. All policies issued by the Association shall be on an annual basis unless sooner terminated in accordance with the provisions of this regulation. All such policies shall be issued subject to the group retrospective rating plan and the stabilization reserve fund authorized by this regulation. Policies may be written on a "claims made" or "occurrence" basis. No policy form shall be used by the Association unless it has been filed with the Director and either (a) he has approved it or (b) thirty (30) days have elapsed and he has not disapproved it.

2. Cancellation of the Association's policies shall be governed by the General Laws of Rhode Island, except that the Association may also cancel any of its policies in the event of non-payment of any stabilization reserve fund charges by mailing or delivering to the insured at the address shown on the policy written notice stating when not less than ten (10) days thereafter cancellation shall be effective.

3. The rates, rating plans, rating rules, rating classification and territories applicable to the insurance written by the Association and statistics relating thereto shall be subject to Title 27, Chapter 9 of the General Laws of Rhode Island, giving due consideration to the past and prospective loss and expense experience for such insurance written and to be written in this state, trends in the frequency and severity of losses, the investment income of the Association, and such other information as the Director may require. All rates shall be on an actuarially sound basis, giving due consideration to the group retrospective rating plan and the stabilization reserve fund, and shall be calculated to be self-supporting. The Director shall take all appropriate steps to make available to the Association the loss and expense experience of insurers previously writing such insurance in this state. To facilitate this procedure all claims will be reported with a duplicate copy to the Director of Business Regulation when reported to the servicing carrier or Association after July 1, 1975. Progress and Evaluation Reports will be submitted on a regular basis.

4. All policies issued by the Association shall be subject to a non-profit group retrospective rating plan to be approved by the Director under which the final premium for all policyholders of the Association, as a group, will be equal to the administrative expenses, loss and loss adjustment expense and taxes, plus a reasonable allowance for contingencies and servicing. Policyholders shall be given full credit for all investment income, net of expenses and a reasonable management fee on policyholder supplied funds. The standard premium (before retrospective adjustment)

for each policy issued by the Association shall be established for portions of the policy period co-inciding with the Association's fiscal year on the basis of the Association's rates, rating plan, rating rules, rating classifications and territories then in effect. The maximum final premium for all policyholders of the Association, as a group shall be limited as provided in paragraph 5 of Section 6 of this regulation.

5. The Director shall examine the business of the Association as often as he deems appropriate to make certain that the group retrospective rating plan is being operated in a manner consistent with this regulation. If he finds that it is not being so operated, he shall issue an order to the Association, specifying in what respects its operation is deficient and stating what corrective action shall be taken.

6. The Association shall certify to the Director the estimated amount of any deficit remaining after the stabilization reserve fund has been exhausted in payment of the maximum final premium for all policyholders of the Association. Within sixty (60) days after such certification the Director shall authorize the members of the Association to commence recoupment of their respective shares of the deficit by one of the following procedures: (a) applying a surcharge to be determined by the Association at a rate not to exceed one (1%) percent of the annual premiums on future policies affording those kinds of insurance which form the basis for their participation in the Association, under procedures established by the Association, or (b) deducting their share of the deficit from past or future taxes due the State of Rhode Island. The Association shall amend the amount of its certification of deficit to the Director as the values of its incurred losses become finalized and the members of the Association shall amend their recoupment procedure accordingly. This section and any authorizations hereunder shall only apply to medical malpractice insurance and no other forms of insurance.

7. In the event that sufficient funds are not available for the sound financial operation of the Association, pending recoupment as provided in paragraph 6 of this section of this regulation, all members shall, on a temporary basis contribute to the financial requirements of the Association in the manner provided for in Section 8. Any such contribution shall be reimbursed to the members by recoupment as provided in paragraph 6 of this section.

SECTION 6. *Stabilization Reserve Fund.*

1. There is hereby created a stabilization reserve fund. The fund shall be administered by three directors, one of whom shall be the Director of Business Regulation or his deputy. The remaining two directors shall be appointed by the Director of Business Regulation. One shall be a representative of the Association, the other a representative of its policyholders.

2. The directors shall act by majority vote with two directors constituting a quorum for the transaction of any business or the exercise of any power of the fund. The directors shall serve without salary, but each director shall be reimbursed for actual and necessary expenses incurred in the performance of his official duties as a director of the fund. The directors shall not be subject to any personal liability or accountability with respect to the administration of the fund.

3. Each insured except so-called "physicians-in-training" shall pay to the Association initially a stabilization reserve fund charge equal to one-third of the first annual

premium due for medical malpractice insurance through the Association. So-called "physicians-in-training" who are entitled to a reduced rate for their classification by virtue of their training status shall pay an initial stabilization reserve fund charge equal to one-third of their first annual premium but shall also be required upon completion of their training to pay an additional stabilization reserve fund charge equal to one-third of the full premium by class less any sums already paid during their training period. Such charge shall be separately stated in the policy. The Association shall cancel the policy of any policyholder who fails to pay the stabilization reserve fund charge. No such reserve fund shall be allowed for any coverage provided by the Association other than medical malpractice.

4. The Association shall promptly pay to the trustee of the fund all stabilization reserve fund charges which it collects from its policyholder and any retrospective premium refunds payable under the group retrospective rating plan authorized by this regulation.

5. All monies received by the fund shall be held in trust by a corporate trustee selected by the directors. The corporate trustee may invest the monies held in trust, subject to the approval of the directors. All investment income shall be credited to the fund. The monies held in trust shall be used solely for the purpose of discharging when due any retrospective premium charges for medical malpractice insurance payable by policyholders of the Association under the group retrospective rating plan authorized by this regulation, and for payment of such taxes as may be payable on the investment income of the fund or otherwise by virtue of the existence of such fund. Payment of retrospective premium charges and taxes shall be made by the directors upon certification to them by the Association

of the amount due. Any monies remaining in the fund after all such retrospective premium charges and taxes have been paid shall be returned to policyholders under procedures authorized by the directors.

SECTION 7. *Procedures.*

1. Any provider of health care shall, on or after the effective date of the plan of operation, be entitled to apply to the Association for medical malpractice insurance and incidental coverage. Such application may be made on behalf of an applicant by a broker or agent authorized by the applicant.

2. If the Association determines that the applicant meets the underwriting standards of the Association as prescribed in the plan of operation and there is no unpaid, uncontested premium due from the applicant for prior insurance (as shown by the insured having failed to make written objection to premium charges within thirty (30) days after billing) then the Association, upon receipt of the premium or such portion thereof as is prescribed in the plan of operation, shall cause to be issued a policy or policies of insurance.

SECTION 8. *Participation.*

1. All insurers which are members of the Association shall participate in its writings, expenses, servicing allowance, management fees and losses in the proportion that the net direct premiums of each such member (excluding that portion of premiums attributable to the operation of the Association) written during the preceding calendar year bears to the aggregate net direct premiums written in this state by all members of the Association. Each insurer's

participation in the Association shall be determined annually on the basis of such net direct premiums written during the preceeding calendar year, as reported in the annual statements and other reports filed by the insurer with the Director.

SECTION 9. *Directors.*

The Association shall be governed by a board of fifteen directors. Eight directors shall represent member companies and be elected annually by cumulative voting by the members of the Association whose votes in such election shall be weighted in accordance with each member's net direct premiums written during the preceding calendar year. The remaining seven directors shall be appointed annually by the Director of Business Regulation six of whom shall be representatives of the medical profession, and one of whom shall be a representative of the hospitals. The annual meeting of the board of directors shall be the anniversary of the effective date of this Regulation. Directors shall serve until their successors are duly elected or appointed as the case may be.

SECTION 10. *Appeals and Judicial Reviews.*

1. Any applicant to the Association, or any person insured pursuant to this regulation, or their representatives, or any affected insurer, may appeal to the Director within thirty (30) days after any ruling, action or decision by or on behalf of the Association, with respect to those items the plan of operation defines as appealable matters.

2. All orders of the Director made pursuant to this regulation shall be subject to judicial review as provided in the General Laws of Rhode Island, Title 42-35-15.

SECTION 11. *Annual Statements.*

The Association shall file in the office of the Director annually on or before the first day of March, a statement which shall contain information with respect to its transactions, condition, operations and affairs during the preceding year. Such statement shall contain such matters and information as are prescribed and shall be in such form as is approved by the Director. The Director may, at any time, require the Association to furnish additional information with respect to its transactions, conditions or any matter connected therewith considered to be material and of assistance in evaluating the scope, operation and experience of the Association.

SECTION 12. *Examinations.*

The Director shall make an examination of the affairs of the Association at least annually. Such examination shall be conducted and the report thereon filed, and expenses of every such examination shall be borne and paid by the Association in the manner prescribed in Title 27-9-36 of the General Laws of Rhode Island.

SECTION 13. *Privileged Communications.*

There shall be no liability on the part of, and no cause of action of any nature shall arise against the Association, the Director or his authorized representatives or any other person or organization, for any statements made in good faith by them during any proceedings or concerning any matters within the scope of this regulation.

SECTION 14. *Public Officers or Employees.*

No member of the board of directors of the stabilization reserve fund who is otherwise a public officer or employee

shall suffer a forfeiture of his office or employment or any loss or diminution in the rights and privileges appertaining thereto, by reason of membership on the board of directors of the stabilization reserve fund.

SECTION 15. *Effective Date—Severability Clause.*

This regulation shall take effect April 9, 1976 at 12:01 a.m.

If any provision of this regulation, or the application thereof to any person or circumstance, is held invalid, such invalidity shall not affect other provisions or applications of this regulation which can be given effect without the invalid provision or application, and to that end the provisions of this application are severable.

/s/ ROBERT E. LIGUORI

ROBERT E. LIGUORI
Director of Business Regulation

Supreme Court, U. S.
FILED
OCT 5 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-240

ST. PAUL FIRE & MARINE INSURANCE COMPANY, *et al.*,
PETITIONERS,

v.

DAVID M. BARRY, M.D., *et al.*,
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

LEONARD DECOF
LEONARD DECOF, LTD.
111 Wayland Avenue
Providence, Rhode Island 02906
Attorney for Respondents

Of counsel:
MARK S. MANDELL
MARTIN W. AISENBERG

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-240

ST. PAUL FIRE & MARINE INSURANCE COMPANY, *et al.*,
PETITIONERS,

v.

DAVID M. BARRY, M.D., *et al.*,
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

The respondents in the above-entitled matter submit that the Petition for a Writ of Certiorari (hereinafter "Petition" or "Pet.") should be denied. The respondents concur in the petitioners' statements under the headings *Opinions Below, Jurisdiction* and *Statutes Involved* in the Petition. The Appendices to the Petition (hereinafter "Pet. App.") are incorporated herein by reference.

Questions Presented

The respondents submit that petitioners' Questions 1, 2 and 3 (Pet. at 4-5) in fact constitute one question stated in three different ways. Moreover, petitioners' Question 4 (Pet. at 5), when considered in light of the arguments presented in support of it (Pet. at 23-25), is not stated clearly. Finally, respondents submit that petitioners' Question 4 attempts to raise an issue that is not properly before this Court because it was not raised in either the district court or the court of appeals. Accordingly, respondents state the questions presented as follows:

1. Must the protection of the boycott exception to the McCarran-Ferguson Act, 15 U.S.C. § 1013(b) (1970), be narrowly limited to boycotts, coercion, or intimidation of insurance companies and agents, or does its protection extend to others, including policyholders?

2. Since petitioners did not challenge the sufficiency of the complaint to raise a claim of boycott, coercion, or intimidation in the courts below, are they not foreclosed from raising that issue in this Court at this time?

3. Does the complaint sufficiently allege acts of boycott, coercion or intimidation?

Statement of the Case

Both the Petition and the *Amici Curiae* Brief of the American Insurance Association, *et al.*, persistently misstate the respondents' allegations of an illegal boycott as "a collective refusal to sell them [respondents] coverage *on terms they desire.*" (Pet. at 25) (emphasis added). To be sure, the *purpose* of the alleged conspiracy was to deny medical malpractice coverage on an occurrence basis to physicians who were insured by petitioner St. Paul at the inception of the conspiracy. Amended Complaint,

Count I, ¶ 30 (Pet. App. at 47a). The alleged boycott itself, however, consisted of the concerted refusal of petitioners Aetna, Travelers and Hartford to sell *any* medical malpractice insurance on *any* terms to physicians then insured by St. Paul. *Id.* ¶ 32 (Pet. App. at 47a-48a). In addition, the complaint alleges that petitioners have engaged in a purposeful course of coercion and intimidation. *Id.* ¶¶ 35, 40 (Pet. App. at 48a-50a). Whether these allegations state a claim upon which relief can be granted depends upon the scope of section 3(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1013(b) (1970), which provides:

> "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce or intimidate, or act of boycott, coercion or intimidation."

In resolving that issue, the First Circuit acknowledged the existence of several cases holding that, notwithstanding the apparent broad scope of the boycott exception, Congress intended that exception to apply only to insurance company boycotts of other insurance companies or agents. The court declined to follow those cases. It pointed out that the first of them, *Transnational Insurance Co.* v. *Rosenlund*, 261 F. Supp. 12 (D. Ore. 1966), "though referring broadly to 'the legislative history,' cited only a single page of the Congressional Record in support of this reading." *Barry* v. *St. Paul Fire & Marine Insurance Co.*, 555 F.2d 3, 7 (1st Cir. 1977) (Pet. App. at 6a), *petition for cert. filed*, 46 U.S.L.W. 3067 (U.S. Aug. 12, 1977) (No. 77-240). It then noted that subsequent cases have simply adopted *Transnational's* interpretation of the legislative history, without any independent analysis of the issue, on the ground that any other reading of the boycott exception would "vitiate" or "emasculate" the McCarran-Ferguson antitrust exemption. *Id.* (Pet. App. at 6a-7a).

The First Circuit based its rejection of prior authority on three grounds. First, the language of the statute is plain and unambiguous, and there is no need to resort to the legislative history to determine its scope. In support of this ground, the court stated that the words of the boycott exception,

> "within the context of the Sherman Act, do not appear to us as ambiguous. In antitrust law, a boycott is a 'concerted refusal to deal' with a disfavored purchaser or seller. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Concerted refusal by a number of companies to sell malpractice insurance policies to doctors who were dissatisfied with the policy offered by their insurer would seem to fit within this definition of boycott. Indeed, appellees make no argument to the contrary. Nor do the cases attempt to justify their excursion into legislative history on the basis of ambiguity of language." 555 F.2d at 7-8 (Pet. App. at 7a-8a). (footnote omitted).

Second, the First Circuit effectively refuted the unsupported assertions of some courts—repeated by petitioners and *amici* herein—to the effect that a narrow construction of the boycott provision is necessary to prevent "vitiation" or "emasculation" of the antitrust exemption. The court pointed out that, if the boycott exception were given its natural scope instead of an artificially narrow reading, McCarran-Ferguson would still (1) ensure the validity of state taxation and regulation of the business of insurance, and (2) insulate insurance companies both from antitrust liability for acts not amounting to boycott, coercion, or intimidation and from many other federal regulatory statutes. *Id.* at 8 (Pet. App. at 8a-9a). Nor, the court continued,

> "would the introduction of antitrust principles into dealings between policyholders and insurers hamstring the state regulatory bodies that have primary responsibility for overseeing the nation's insurance business. A necessary regulatory measure could seldom be successfully challenged as a state-inspired 'boycott, coercion, or intimidation,' for the boycott provision merely guarantees that '[n]othing contained in *this chapter* shall render the said Sherman Act inapplicable' to boycotts and the like. 15 U.S.C. § 1013(b) [emphasis added].* The chapter in question is the McCarran-Ferguson Act. The boycott provision merely neutralizes that Act, leaving intact the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), which today insulates state regulatory schemes outside the insurance context from antitrust liability. [Citation omitted.] Indeed, *Parker* v. *Brown* may have added strength in the insurance field because of the policies reflected in the McCarran-Ferguson Act. *But there is a large difference between allowing a state to fix insurance rates without fear of antitrust sanctions and similarly insulating companies which, outside any state-permitted structure or procedure, agree among themselves that customers dissatisfied with the coverage offered by one company shall not be sold any policies by any of the other companies.* Contrary to the argument of some of the appellees, giving normal scope to the boycott provision will not plunge federal courts into the enterprise of retroactive rate-making. Regulation by the state would be protected; concerted boycotts against groups of consumers not resting on state authority would have no immunity." *Id.* at 8-9 (Pet. App. at 9a-10a). (emphasis added).

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* Emphasis added by the court.

Finally, notwithstanding its belief that reference to the legislative history was unwarranted, the court entered into a detailed consideration of that history "in deference to the courts which have found support in [it]." *Id.* at 9 (Pet. App. at 12a). After an extensive discussion, including quotations of the congressional remarks relied upon most heavily by petitioners, the court concluded that the legislative debates and reports not only contain no evidence of a congressional intent to limit the boycott exception to acts or agreements directed against other insurance companies or agents, but actually support the view that the exception includes any boycott that is illegal under the Sherman Act:

> "[T]he boycott provision [was] the all purpose safety valve. It was amended twice, in each case to make it broader, first by making its effective across the entire Act and second by restoring the agreement language. Time after time the concern of skeptics and opponents were met by reference to this provision. We cannot imagine that they would have been at all satisfied if they had understood that 'boycott' was a code word confined to industry personnel. *See* Levi, *An Introduction to Legal Reasoning,* 15 U. Chi. L. Rev. 501, 522 (1948). * * * While the vice of insurance company self-government outside the law obviously lay in their minds as a major evil to be combatted by the legislation, there is no suggestion that the legislation was limited to that evil. Indeed, Senator O'Mahoney referred to the Insurance Executives Association rules as 'the sort of agreement' to be condemned. *His summary answer to Senator Barkley that 'every effective combination or agreement to carry out a program against the public interest' would be prohibited by the boycott section could not be more unrestricted."* *Id.* at 11-12 (Pet. App. at 18a-19a) (emphasis added).

Reasons for Refusing the Writ

I. The Opinion of the First Circuit Gave Full Consideration to the Issues Presented and Decided Them Correctly.

The First Circuit majority was, perhaps, being charitable when it referred to the prior cases with which it disagreed as a "formidable array of authorities." *Id.* at 7 (Pet. App. at 6a). In reality, those cases are formidable only by their bulk, not by their persuasiveness. They contain no reasoning to support their artificially narrow reading of the boycott exception; their discussions of the issue are uniformly brief, superficial and conclusory. The most cursory examination of these cases reveals their lack of persuasive force. *Accord,* Brief for Respondent in Opposition at 4-5, *Blue Shield* v. *Ballard,* 97 S. Ct. 1341 (1977), *denying cert. to* 543 F.2d 1075 (4th Cir. 1976).

Even the number of the authorities *contra* is not impressive when the cases are closely examined. Most of them are district court cases that simply follow circuit precedent. There are only two appellate decisions that are contrary to the decision of the First Circuit in the present case—and both of them adopt, without analysis, and rely entirely on a brief paragraph of dicta from a single district court opinion. Moreover, one of those appellate decisions, an opinion of the Fifth Circuit, is in direct conflict with a nearly contemporaneous decision by another panel of the same circuit.

The First Circuit is not only the first court to present reasoned grounds for its decision on this issue; it is also the first court to quote the relevant legislative history and to explain the basis for the conclusion it draws therefrom, instead of making undocumented and unsupported assertions about "the" legislative history. A comparison of the

First Circuit's opinion with those of the authorities *contra* clearly reveals the correctness of the former. Moreover, there is other case authority—some of it either misstated or ignored in the Petition—that strongly supports the decision of the First Circuit.

A. *The opinions in* Transnational *and its progeny are so brief and conclusory as to have little, if any, precedential value.*

The line of cases relied upon by petitioners begins with *Transnational Insurance Co.* v. *Rosenlund*, 261 F. Supp. 12 (D. Ore. 1966). Since the *Transnational* court expressly found that, on the record before it, there had been no boycott, *id.* at 26-29, its comments concerning the scope of the boycott exception are only dicta. Moreover, those dicta are confined to a single brief paragraph, which cites—but does not quote—only one remark from the extensive congressional debates as the basis for its conclusion that Congress intended the apparently broad boycott exception to have an extremely narrow application. *Id.* at 26-27 & n.1.

Despite the casual nature of these gratuitous comments, two courts of appeals and several district courts have taken them as gospel. *Addrisi* v. *Equitable Life Assurance Society of the United States*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975), simply follows *Transnational* and the district court decision in *Meicler* v. *Aetna Casualty & Surety Co.*, 372 F. Supp. 509 (S.D. Tex. 1974), *aff'd*, 506 F.2d 732 (5th Cir. 1975), which had also followed *Transnational*. The *Addrisi* court quoted *Transnational*'s brief discussion of the issue almost in full; it made no independent examination of the legislative history. It then asserted, without discussion, that any other holding would "vitiate" the McCarran-Ferguson Act. 503 F.2d at 729.

The opinion of a panel of the Fifth Circuit in *Meicler* v. *Aetna Casualty & Surety Co.*, 506 F.2d 732 (5th Cir. 1975), is even briefer than the *Addrisi* opinion. The court cited only *Transnational* and the decision of the court below in support of its holding. Like the Ninth Circuit, the *Meicler* court neither entered into an independent consideration of the legislative history nor provided any reasoned analysis of the grounds for its decision. *Id.* at 734-35.

Furthermore, *Meicler* was really a price-fixing case, notwithstanding the efforts of the plaintiffs therein to frame their complaint in terms of a boycott. "[T]he alleged boycott [in *Meicler*] consisted of nothing more than adherence by a group of insurance companies to premium rates set by a state regulatory agency, or perhaps by private agreement." *Proctor* v. *State Farm Mutual Automobile Insurance Co.*, 1977-1 Trade Cas. ¶ 61,481, at 71,869 n.21. (D.C. Cir. June 17, 1977). Thus, the court's perfunctory rejection of the plaintiffs' arguments concerning the scope of the boycott exception may well have resulted from the patent failure of the complaint to allege a boycott. In any event, petitioners' statement that the allegations in *Meicler* are "a precise analogue to those presented here" (Pet. at 14) is incorrect; for the complaint in this case alleges the concerted refusal of three of the defendant insurance companies to sell *any* medical malpractice insurance on *any* terms to the policyholders of the fourth.

Finally, *Meicler* conflicts with a decision handed down only a few months earlier by another panel of the Fifth Circuit in *Battle* v. *Liberty National Life Insurance Co.*, 493 F.2d 39 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975). *See* section I B of this Brief, *infra*. The respondents, therefore, do not agree with petitioners that *Meicler* represents the current position of the Fifth Circuit on this issue; rather, we submit that *Meicler* has created an intra-circuit conflict in the Fifth Circuit insofar as it is

inconsistent with *Battle*. Thus, only one circuit—the Ninth —has clearly taken a position contrary to the decision of the First Circuit in the present case.

The other cases relied upon by petitioners — all of them district court decisions — add nothing to the analysis. They merely reassert the alleged intent of Congress that the boycott exception be limited to a narrow class of boycotts, cite each other as compelling authority, and ultimately rely on *Meicler, Addrisi* and/or *Transnational*.[1] Not one of them undertakes either an independent consideration of the reasons for its decision or an independent examination of the legislative history. Their number does not increase their precedential value.

In sharp contrast to *Transnational* and its progeny, the opinion of the First Circuit in the present case gives a detailed, well-reasoned discussion of the basis for its holding. 555 F.2d at 7-9 (Pet. App. at 7a-12a). Salient portions of that discussion are quoted in respondents' *Statement of the Case, supra*. The First Circuit's opinion is manifestly superior to the conclusory discussions in *Transnational, Meicler* and *Addrisi*.

The First Circuit opinion also includes a detailed examination of the legislative history, *id.* at 9-12 (Pet. App. at

[1] *Pierucci* v. *Continental Cas. Co.*, 418 F. Supp. 704, 708-09 (W.D. Pa. 1976); *McIlhenny* v. *American Title Ins. Co.*, 418 F. Supp. 364, 371-72 (E.D. Pa. 1976) (really a tying case, not a boycott case); *Royal Drug Co.* v. *Group Life & Health Ins. Co.*, 415 F. Supp. 343, 349-50 (W.D. Tex. 1976), *appeal docketed*, No. 72-2746 (5th Cir. June 24, 1976); *Seasongood* v. *K & K Ins. Agency*, 414 F. Supp. 698, 702 (E.D. Mo. 1976), *rev'd on other grounds*, 548 F.2d 729 (8th Cir. 1977); *Mathis* v. *Automobile Club Inter-Ins. Exch.*, 410 F. Supp. 1037, 1041 (W.D. Mo. 1976); *Ohio* v. *Ohio Medical Indem., Inc.*, 1976-2 Trade Cas. ¶61,128, 68-397-98 at 70,113 (S.D. Ohio 1976); *Pastor* v. *Hartford Fire Ins. Co.*, 1976-1 Trade Cas. ¶60,783, at 68,397-98 (C.D. Cal. 1976), *appeal docketed*, No. 77-1243 (9th Cir. Jan. 26, 1977); *Proctor* v. *State Farm Mut. Auto. Ins. Co.*, 406 F. Supp. 27, 32 (D.D.C. 1975), *aff'd on other grounds*, 1977-1 Trade Cas. ¶61,481 (D.C. Cir. June 17, 1977); *Mitgang* v. *Western Title Ins. Co.*, 1974-2 Trade Cas. ¶75,322, at 98,026 (N.D. Cal. 1974).

12a-18a), which demonstrates that the interpretation of that history adopted in *Transnational* and its progeny is unsupportable. The *Transnational* interpretation holds that, since insurance company blacklists are the only specific evil mentioned in the legislative debates, they must be the only evil that the boycott exception was intended to remedy. We submit that the conclusion does not follow from the premise. Even petitioners admit that "boycotts and blacklists of other insurance companies and agents • • • were Congress' *main* concern at the time it enacted the exception • • • ." (Pet. at 3) (emphasis added). This statement necessarily concedes that Congress had some other concerns as well when it enacted the boycott exception; and neither petitioners nor the cases upon which they rely suggest any reason to believe that Congress' concern did not extend to all potential victims of insurance company boycotts, coercion, or intimidation — including policyholders.

Selected quotations from the congressional debates on the boycott exception are annexed hereto as Appendix A. It is readily apparent that these debates, which contain many emphatic statements of the broad scope of the boycott exception, give substantial support to the First Circuit's decision. In addition, a letter from former Representative Emanual Celler, published in the Congressional Record in response to the *Addrisi* decision, is annexed hereto as Appendix B. Mr. Celler was the author of the remarks cited by the *Transnational* court in support of its view of the scope of the boycott exception. Those remarks are also included in Appendix B, and, as Mr. Celler's letter makes clear, they provide no support for the decisions in *Transnational* and its progeny.

B. *Other case authority strongly supports the decision of the First Circuit.*

The petitioners attempt to portray the decision of the First Circuit in this case as a legal aberration — unprece-

dented and unprincipled. This portrayal is inaccurate. Although it is the first decision of its kind *on these facts,* the First Circuit's decision is well supported by both prior and subsequent cases.

To begin with, the Second Circuit has squarely held that "*all* boycotts or agreements to boycott condemned by the Sherman Act are rendered subject to federal law" by the boycott exception. *Monarch Life Insurance Co.* v. *Loyal Protective Life Insurance Co.,* 326 F.2d 841, 846 (2d Cir. 1963), *cert. denied,* 376 U.S. 952 (1964) (opinion of Kaufman, J.) (emphasis added); *accord, Professional Adjusting Systems of America, Inc.* v. *General Adjustment Bureau, Inc.,* 64 F.R.D. 35, 42-43 (S.D.N.Y. 1974); *Travelers Insurance Co.* v. *Blue Cross,* 306 F. Supp. 219, 221 (W.D. Pa. 1969); *Cooperativa de Seguros Multiples* v. *San Juan,* 294 F. Supp. 627, 628 (D.P.R. 1968); *see Professional & Business Men's Life Insurance Co.* v. *Bankers Life Co.,* 163 F. Supp. 274, 282-83 (D. Mont. 1958).

Furthermore, both the Fourth Circuit and a panel of the Fifth Circuit, have, like the First Circuit, refused to limit the boycott exception to boycotts against other insurance companies and agents. The Fifth Circuit case is *Battle* v. *Liberty National Life Insurance Co.,* previously referred to in section IA, *supra.* The complaint in that case alleged acts of boycott, coercion and intimidation by the defendant, a provider of funeral insurance, against funeral homes that refused to submit to its monopolistic practices. The court first discussed at some length the possibility that the defendant's alleged activities did not constitute "the business of insurance" and therefore did not qualify for the antitrust exemption contained in section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. §1012(b) (1970). The court was of the opinion, however, that "the facts in the case at hand are inadequately developed to make a conclusive determination of this question * * *." 493 F.2d at 50. Accordingly, the court continued as follows:

> "Even assuming that defendants are engaged in the business of insurance and that it is regulated by state law, ***this exemption is eviscerated by any boycott, coercion or intimidation on behalf of the defendants.*** The complaint specifically alleges that the defendants have engaged in such activities. Among other averments, plaintiffs set out in the complaint that, if an authorized funeral director in a particular area decides to cancel his contract with Brown-Service, the defendants have threatened to build a competing funeral home in the same locality. Liberty National, it is asserted in the complaint, has threatened to cancel contracts of those who oppose its activities. Moreover, the plaintiffs allege acts of physical violence in Liberty national's asserted attempt to monopolize the industry. Without a hearing to establish the validity of such contentions, the district court could not accurately determine the applicability of this limitation of the McCarran Act." *Id.* at 51 (emphasis added) (footnote omitted).

Although petitioners have understandably chosen not to mention *Battle* in the Petition, they have argued in the courts below that *Meicler* implicitly overruled it. We cannot agree. The overruling of circuit precedent is a function that can be performed only by all the active judges of a court of appeals sitting en banc, not by a panel. Moreover, the *Battle* panel included Judge John Wisdom, one of the most distinguished circuit judges in the nation. It would seem that *Battle* is entitled to at least as much precedential weight within the Fifth Circuit as *Meicler,* which was not even a boycott case. (*See* section IA, *supra*). The respondents submit, therefore, that the Fifth Circuit cannot yet be claimed by either side in the present case.

In the Fourth Circuit case mentioned above, *Ballard* v. *Blue Shield,* 543 F.2d 1075 (4th Cir. 1976), *cert. denied,* 97

S. Ct. 1341 (1977), the court held that a conspiracy of physicians and health insurers to refuse health insurance coverage for services rendered by chiropractors constituted a boycott and fell within the boycott exception. *Id.* at 1078. Like the First Circuit's decision in the present case, *Ballard* constitutes a refusal to limit the protection of the boycott exception to insurance companies and agents.

Finally, the First Circuit's position is strongly supported by the recent decision of the District of Columbia Circuit in *Proctor* v. *State Farm Mutual Automobile Insurance* Co., 1977-1 Trade Cas. ¶61,481 (D.C. Cir. June 17, 1977). The petitioners have stated the facts of *Proctor* correctly. (Pet. at 16). They are mistaken however, in their assertion that it represents "yet another narrower construction of the boycott exception" (Pet. at 16) and that it is "flatly inconsistent with the result reached by the First Circuit" (Pet. at 17). To begin with, the *Proctor* court recognized that

> "there is no hint in the plain language of the provision that only acts and agreements directed against insurance companies or agents were to be subject to the exception. And our examination of the legislative history of the provision, and the target at which it was aimed, convinces us that no such limitation was intended." *Id.* at 71,867.

The court then proceeded to examine the legislative history in some depth, *id.* at 71,867-69, thus becoming the only court other than the First Circuit to do so. It concluded that the legislative history shows that "blacklists were *a* concern of the Congress—perhaps even the principal concern—but does not show that they were the *only* concern." *Id.* at 71,868 (emphasis in the original). After noting that the "boycott, coercion or intimidation" language was drawn from *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533, 535 (1944), the court concluded that the boycott exception "was intended to preserve *South-Eastern Underwriters* to the extent that the latter subjected acts of 'boycott, coercion, or intimidation' to the prohibitions of the Sherman Act." 1977-1 Trade Cas. at 71,869.

Thus, the only court other than the First Circuit to consider this issue in depth has reached the same conclusion as did the First Circuit. The short answer to petitioners' assertion that *Proctor* does not allow policyholder suits (Pet. at 17) is that *Proctor* was not a policyholder suit, and the court therefore had no occasion to discuss the matter. The fact remains that *Proctor* emphatically rejected the artificial *Transnational* limitation of the boycott exception, calling it "unsupported by [the exception's] plain language, its legislative history, or the historical context in which it was passed." 1977-1 Trade Cas. at 71,869. It can hardly be doubted that the District of Columbia Circuit would, in an appropriate case, join the First Circuit in holding that the boycott exception includes boycotts against policyholders. Thus, it is *Meicler* and *Addrisi* that are aberrations, not *Barry*.

C. *The dire consequences predicted by petitioners and* amici *will not occur.*

The *amici* argue that the present suit seeks to "call into question state-regulated insurance practices" and that, if it is permitted to proceed, the federal courts "will be placed in the position of passing upon the efficacy and propriety of the minutiae of state insurance regulation." (*Amici Curiae* Brief of the American Insurance Association, *et al.*, at 8). This argument is not well taken, however, for the alleged boycott in this case was neither mandated nor approved nor even permitted by any state regulatory agency; it took place entirely outside the structure of state regulation. *See Barry* v. *St. Paul Fire & Marine Insurance Co.*, 555 F.2d at 9 (Pet. App. at 10a). Consequently,

neither the "efficacy" nor the "propriety" of state insurance regulation is at issue in this case. If the matter is permitted to proceed in the district court, the antitrust claim will be litigated without any reference to state regulatory practices, and state regulation of insurance rates and coverages will not be disturbed.[2]

The petitioners' argument that the First Circuit's decision limits the McCarran-Ferguson antitrust exemption to the acts of individual monopolists (Pet. at 21) is also mistaken. There are many conspiracies condemned by the antitrust laws, such as price fixing, price discrimination and tying arrangements, that cannot be described as boycotts.[3] In arguing that the First Circuit's decision means wide-open antitrust liability for insurance companies, petitioners and *amici* have confused the scope of the boycott exception with the definition of the term "boycott." It is neither necessary nor appropriate to give the boycott exception an artificially narrow reading in order to avert the imaginary horribles conjured up by petitioners (Pet. at 21) and *amici* (*Amici Curiae* Brief of the American Insurance Association, *et al.*, at 8-9);[4] all that is needed is a reasonable definition of what conduct constitutes a boycott — a matter to be taken up in section IIIB of this Brief, *infra*. *See Proctor* v. *State Farm Mutual Automobile Insurance Co.*, 1977-1 Trade Cas. at 71,869.

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[2] Moreover, petitioners' statement that the commencement of this suit "virtually coincided with the formation by Rhode Island of a Joint Underwriting Association ('JUA')" (Pet. at 8), though literally true, is quite misleading; for the amended complaint alleges that petitioners' fraudulent acts and misrepresentations created the purported "malpractice insurance crisis" that led to the formation of the JUA. Amended Complaint, Count III, ¶¶16-18 (Pet. App. at 58a-59a). This count has been dismissed and is not at issue before this Court.

[3] In fact, one of the arguments against the boycott exception in the Senate debates was that it left *too much* room for insurance companies to engage in activities that would otherwise be antitrust violations. *See* Appendix C, *infra*.

[4] The practices described by *amici* are typically state-approved or state-mandated and therefore exempt from the antitrust laws. *See Barry* v. *St. Paul Fire & Marine Ins. Co.*, 555 F.2d at 8-9 (Pet. App. at 9a-10a). That is not the case with the conduct alleged here.

D. *The decision below does not conflict with* SEC v. National Securities, Inc.

Finally, it should be noted that petitioners' reliance on *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969), is misplaced. In that case, the Court had to decide whether a state statute designed to protect the owners of insurance company stock was a law regulating "the business of insurance" and therefore, by virtue of McCarran-Ferguson, preemptive of the Securities Exchange Act. Thus, the Court's discussion of McCarran-Ferguson concerned only the definition of "the business of insurance" under section 2(b) of that Act, 15 U.S.C. §1012(b) (1970); the Court did not consider the extent to which that business remained subject to the antitrust laws by virtue of the boycott exception set forth in section 3(b), *id.* §1013(b). There is, therefore, no conflict between the First Circuit's decision in the present case and the *National Securities* decision.

II. The Issue Is Not Ripe For Review by This Court.

The respondents recognize, of course, that there is a conflict between the First, Second and District of Columbia Circuits on the one hand and the Ninth Circuit on the other, plus an intracircuit conflict within the Fifth Circuit, concerning the scope of the boycott exception.[5] However, this

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[5] The petitioners' suggestion that the Third Circuit agrees with the Ninth Circuit on this issue (Pet. at 15) is mistaken. The district court in *Frankford Hospital* v. *Blue Cross*, 417 F. Supp. 1104 (E.D. Pa. 1976), followed *Meicler* only insofar as that case held that the boycott exception was intended *primarily* to deal with insurance company blacklists. The court then said, *id.* at 1110 n.14:

> "We apply emphasis to the word 'primarily' because we do not believe section 1013(b) should be strictly limited to * * * insurance company blacklisting. In appropriate circumstances, the language of that provision would reach other practices which have the same purpose and effect as black-

Court no longer grants certiorari as a matter of course simply because there is a split in the circuits. *See* Stern, *Denial of Certiorari Despite a Conflict,* 66 Harv. L. Rev. 465 (1953). We submit that certiorari should be denied in this case, notwithstanding the split in the circuits, because the issue is not ripe for review.

A. *The conflict may resolve itself.*

As pointed out in section I of this Brief, *supra,* the First Circuit's opinion in the present case is the first opinion on this issue to undertake a detailed discussion of the matter, including a thorough examination of the legislative history, and to give reasoned grounds for its decision. The subsequent *Proctor* opinion is equally thoughtful, detailed and well-reasoned—and, it should be noted, reaches the same conclusion as did the First Circuit without having had the benefit of the First Circuit's opinion. By comparison, the *Meicler* and *Addrisi* opinions are superficial and conclusory. Moreover, *Battle* is at least as persuasive a precedent within the Fifth Circuit as *Meicler.*

Cases that present this same issue are now pending in the Fifth and Ninth Circuits. *Royal Drug Co.* v. *Group Life & Health Insurance Co.,* 415 F. Supp. 343 (W.D. Tex. 1976), *appeal docketed,* No. 76-2746 (5th Cir. June 24, 1976);

listing or which are equally pernicious in violating the most fundamental notions of competition and fair play. In the instant case we are not presented with circumstances that require us to decide that issue."

The court went on to find that, assuming that the boycott exception did apply, there was no boycott in the case before it. The Third Circuit affirmed on the ground that there was no boycott. *Frankford Hosp.* v. *Blue Cross,* 554 F.2d 1253 (3d Cir. 1977) (per curiam), *petition for cert. filed,* 46 U.S.L.W. 3040 (U.S. July 29, 1977 (No. 77-171). Thus, the Third Circuit has not passed on the scope of the boycott exception and is not involved in the conflict among the circuits on this issue. If anything, its implicit approval of the district court's dicta in *Frankford* supports the position of the First Circuit.

Pastor v. *Hartford Fire Insurance Co.,* 1976-1 Trade Cas. ¶ 60,783 (C.D. Cal. 1976), *appeal docketed,* No. 77-1243 (9th Cir. Jan. 26, 1977). Those courts will now have the benefit of the *Barry* and *Proctor* opinions. It is submitted that they may well find those opinions more persuasive than *Meicler* and *Addrisi.* If they do, *Meicler* and *Addrisi* will be overruled within the coming year, thus eliminating both the split in the circuits and the intracircuit conflict in the Fifth Circuit. Review by this Court at this time would therefore be premature.

B. *Even if the conflict does not resolve itself, this Court would benefit from further consideration of the issue by the courts of appeals.*

It is possible, of course, that the Ninth Circuit will adhere to its prior decision in *Addrisi* and that the Fifth Circuit will choose to follow *Meicler* rather than *Battle.* If so, however, those courts will have to rebut in some detail the arguments set forth in *Barry* and *Proctor.* They will have to give reasoned grounds for their decisions. They will have to specify the legislative history upon which they rely, as they did not do in *Meicler* and *Addrisi.* Such thorough, well-reasoned opinions would be a far more satisfactory basis for review than are the many superficial opinions presently available.

This Court would benefit by having the best possible opinions from courts on both sides of the issue—not just one side—when and if it takes the matter up for review. The *Barry* and *Proctor* opinions will surely have a profound effect on the development of the law on this point in the circuits. The respondents submit that this development should be permitted to continue until all of the relevant issues have been fully aired in the courts of appeals.

III. The Issue Raised by Petitioners Concerning the Sufficiency of the Complaint's Allegations of a Boycott Should Not Be Taken Up For Review in Any Event.

The petitioners' Question 4 (Pet. at 5) amounts to a contention that their alleged concerted refusal to deal with certain policyholders does not constitute a boycott within the common meaning of that term. (*See* Pet. at 23-25). The respondents submit that this issue is not properly before the Court and that, even if it is, petitioners' argument is without merit and the issue is not an appropriate subject for review by this Court.

A. *The issue is not properly before the Court.*

The petitioners moved to dismiss Count I of the Amended Complaint on the ground that McCarran-Ferguson "exempts from the operation of the Clayton Act and the Sherman Act state regulated insurance business." (Appendix D, *infra*). That was also the basis of the district court's decision to grant the motion. (Pet. App. at 30a-31a). The petitioners did not claim any other insufficiency of the complaint in the district court. Nor did they argue in the court of appeals that the conduct alleged in the complaint does not constitute a boycott within the common meaning of that term. 555 F.2d at 7-8 (Pet. App. at 8a). They are therefore precluded from raising that issue on certiorari in this Court. The Court has refused in numerous cases brought before it on writs of certiorari to pass on issues not properly raised in the courts below. *See FTC* v. *Travelers Health Association*, 362 U.S. 293, 298-99 n.4 (1960); *FTC* v. *Simplicity Pattern Co.*, 360 U.S. 55, 61-62 n.4 (1959); *Sonzinsky* v. *United States*, 300 U.S. 506, 514 (1937); *Lynch* v. *United States*, 292 U.S. 571, 587-88 (1934); *New York Dock Co.* v. *Steamship Poznan*, 274 U.S. 117, 123 (1927); *cf. Cardinale* v. *Louisiana*, 394 U.S. 437 (1969).

B. *The complaint sufficiently alleges boycott, coercion and intimidation.*

The First Circuit found a footnote and a brief textual discussion sufficient to deal with this issue. 555 F.2d at 7-8 & n.4. As it pointed out, the Ninth Circuit has squarely held that the concerted refusal of manufacturers or dealers to do business with customers is a boycott for antitrust purposes. *Washington State Bowling Proprietors Association* v. *Pacific Lanes, Inc.*, 356 F.2d 371, 376 (9th Cir.), *cert. denied*, 384 U.S. 963 (1966). Even *Transnational Insurance Co.* v. *Rosenlund, supra*, upon which petitioners rely so heavily, states that "the generally accepted meaning of boycott" is "a concerted refrainment from business relations with another," 261 F. Supp. at 28, without any limitations on who that "other" might be.

Any doubt as to the correctness of the holding in *Washington State Bowling, supra*, is dispelled by consideration of two decisions of this Court. In *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533 (1944)—the case from which Congress drew the "boycott, coercion or intimidation" language of McCarran-Ferguson—the Court described the charges set forth in the indictment as follows:

> "The conspirators not only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force nonmember insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from S.E.U.A. members on S.E.U.A. terms. * * * [*P*]*ersons needing insurance who purchased from non-*

> *S.E.U.A. companies were threatened with boycotts and withdrawal of all patronage.*" *Id.* at 535-36 (emphasis added).

Moreover, the concluding paragraph of the opinion referred to "combinations of insurance companies to coerce, intimidate, and boycott competitors *and consumers.*" *Id.* at 562 (emphasis added). Thus, the *South-Eastern Underwriters* Court was clearly of the opinion that consumers in general, and consumers of insurance in particular, could be the subject of a boycott. And, as the District of Columbia Circuit said in *Proctor,* "[w]e find it hard to believe that Congress would have intended a construction of the boycott provision which excludes from its sweep activities explicitly addressed in the case from which its language is drawn." 1977-1 Trade Cas. at ¶ 71,869.

The issue was addressed again in *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.,* 364 U.S. 656 (1961) (per curiam). The complaint in that case alleged that the defendants had conspired against the plaintiff by refusing to give its gas burner a seal of approval and by refusing to sell gas to consumers for use in any burner that did not have a seal of approval. The Court held that the alleged concerted refusal of the defendant gas companies to deal with *consumers* would, if proved, constitute a *per se* violation of the Sherman Act. *Id.* at 659-60. Although the Court did not use the word "boycott," it clearly indicated, *id.,* that its decision was based upon *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959)—a leading boycott case.

Thus, petitioners' argument that the concerted refusal of insurers to deal with policyholders does not constitute a boycott is without merit. There is no split among the circuits on this issue, nor is it a matter of such doubt and importance as otherwise to call for review by this Court.

Finally, the complaint expressly alleges coercion and intimidation by petitioners. Amended Complaint, Count I, ¶¶ 35, 40 (Pet. App. at 48a-50a). The petitioners have never challenged the sufficiency of these allegations. Thus, even if the conduct alleged in the complaint does not constitute a boycott, respondents are still entitled to proceed under the coercion or intimidation exception. Consequently, petitioners' arguments concerning the definition of the term "boycott" are not of a dispositive nature and should not be taken up for review in any event.

Conclusion

For the reasons set forth herein, the petition for a writ of certiorari should be denied. If, however, the Court should determine to grant certiorari, the grant should be limited to Question 1 as stated in this Brief, *supra* p. 2.

Respectfully submitted,

LEONARD DECOF
LEONARD DECOF, LTD.
111 Wayland Avenue
Providence, Rhode Island 02906
Attorney for Respondents

Of counsel:
MARK S. MANDELL
MARTIN W. AISENBERG

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APPENDIX A

Selections from the Legislative Debates on the Boycott Exception

1. 91 Cong. Rec. 478 (1945) (remarks of Senator Ferguson) (emphasis added):

> No, I will answer that by saying that *if agreements in restraint of trade or to monopolize amounted either to a boycott or to coercion and/or intimidation, they would be absolutely void,* because they would contradict the bill which is now being considered by the Senate and which it is hoped will be passed today.

2. *Id.* at 1090 (remarks of Representative Gwynne) (emphasis added):

> The important part of the bill is that section which provides for a moratorium as far as the application of the Sherman and Clayton Acts are concerned. *Part of the Sherman Act is in effect right now; in fact, that part having to do with boycotts, coercion, and intimidation.* The rest of the Sherman Act and the Clayton Act will not take effect until July 1, 1948.

3. *Id.* at 1443 (remarks of Senator Ferguson) (emphasis added):

> *There are certain things which a State cannot interfere with. It cannot interfere with the application of the Sherman Act to any agreement to boycott, coerce, or intimidate, or an act of boycotting, coercion, or intimidation.*

4. *Id.* at 1481 (remarks of Senator Ferguson) (emphasis added):

> Under the language which is now in the bill as it appears in the conference report, if a State passes

> an act regulating insurance or taxing insurance, and that regulation is contrary to the Sherman Act or the Clayton Act, with three exceptions, then the State law would be the law. Here are the exceptions: "Nothing contained in this act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."
>
> *In other words, under the terms of the bill, there are six things on which a State would not legislate. They are boycott, coercion, or intimidation, or agreements to boycott, coerce, or intimidate.*

5. *Id.* at 1486 (colloquy between Senator Barkley and Senator O'Mahoney (emphasis added):

> MR. BARKLEY. Let me ask this question: Suppose the regulatory laws of a State permit combinations which might be regarded as violative of the Sherman or Clayton Acts, and over which Congress itself might wish to exercise jurisdiction, are such combinations so sanctioned by the laws of the States to be allowed, even if Congress itself should decide to exercise jurisdiction?
>
> MR. O'MAHONEY. No; my judgment is that *every effective combination or agreement to carry out a program against the public interest* of which I have had any knowledge in this whole insurance study *would be prohibited by the very section [3(b)] the Senator from Kentucky had quoted.*

6. *Id.* (remarks of Senator O'Mahoney):

> [T]he great gain which has been achieved by the complete agreement of the Senate and House conferees, to the effect that agreements as well as acts of boycott, coercion, and intimidation should be outlawed, is so distinctly in the public interest that we should not risk its loss.

APPENDIX B

Remarks of Representative Celler Concerning the Boycott Exception

1. Cong. Rec. 1087 (1945) (remarks of Representative Celler):

> What is the danger in leaving the word [agreement] out? There is a great deal of danger. These great companies can issue a blacklist. It need not be in writing, there need not be a so-called overt act, it could be an oral blacklist, and they would frighten the wits out of all these small companies. In addition there could be an "agreement" for what is known as separation. Let me tell you something about the "separation." Under "separation," if the agent wrote insurance for an outside or marked or proscribed company, or a blacklisted company, he was immediately stripped of his privileges; that is to say, he was not permitted to write insurance for any of the members of the self-constituted governing organizations known as boards. If a member of any of the boards wrote business through that agent which represented independent or nonmember companies, such member company was subject to punishment and was compelled to give up the business.
>
> That's why I want the word "agreement" put back in the bill.

2. 120 Cong. Rec. 37351 (1974) (remarks of Representative Corman) (footnote omitted):

> Mr. CORMAN. Mr. Speaker, a letter and memorandum on the legislative history of section 3(b) of the McCarren-Ferguson Act, 59 Stat. 34 (1945), 15 U.S.C. 1013(b) were brought to my attention. Today, I would like to share them with my colleagues. Their author is the then chairman of the House Judiciary Committee and one of the great legislators of all times, the Honorable Emanuel Cellar [sic].
>
> The articles follow:
>
> WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER,
> *New York, N.Y., November 15, 1974.*
>
> GEORGE D. DONNAHOE, Esq.,
> *Hollywood, Calif.*
>
> DEAR MR. DONNAHOE: This has reference to your letter of October 22, 1974 regarding the opinion of the Ninth Circuit Court of Appeals in *Addrisi* v. *The Equitable Life Assurance Society of the United States*, No. 72-2607 (slip op., Sep. 30, 1974). That opinion—relying on *Meicler* v. *Aetna Casualty and Surety Company*, 372 F. Supp. 509 (S.D. Texas, 1974), and *Transnational Insurance* v. *Rosenlund*, 261 F. Supp. 12 (D. Oreg. 1966)—states that it is evident from an examination of the legislative history behind [15 U.S.C.] § 1013(b) [of the McCarren-Ferguson Act] *"that the intent of Congress was to reserve unto the reach of the Sherman Act only a narrow area of restraint of trade among those in the business of insurance, namely anti-trust acts among insurance companies and agents for the purpose of boycott or coercion among insurance companies and agents."* [Emphasis added.] Slip op. at 6-7.
>
> "The legislative history [behind the McCarran-Ferguson Act] shows that the boycott, coercion . . . exception, was placed in the legislation to protect insurance agents from the issuance by insurance companies of a black-list, which would name companies or agents which were beyond the *pale*. This list, in effect,

was a directive to an agent not to write insurance in the name of or for the blacklisted company; otherwise, he would be stripped of his agency and not permitted to write insurance for any of the members of the governing organization of insurance companies. 1. 91 Congressional Record, p. 1087 (79th Congress, 1st Session)."

The Congressional Record reference thus cited has to do with remarks I made on the House floor in which I endeavored—successfully—to amend the House version of the McCarran-Ferguson bill to make the Sherman Act applicable not only to any act of boycott, coercion, or intimidation (as provided in the House bill), but also to any agreement to boycott, coerce, or intimidate. My entire purpose in urging this amendment was thus to *broaden* and not to restrict the applicability of the Sherman Act. By no stretch of the imagination can my remarks be construed as intended to limit the applicability of the Sherman Act to antitrust acts among insurance companies and agents for the purpose of boycott or coercion among insurance companies and agents. To the contrary, I think it crystal clear, both from my own remarks and from the legislative history of the McCarran-Ferguson Act, that § 1013(b) was intended to render the Sherman Act applicable to (i) *all* agreements to boycott, coerce or intimidate and (ii) to *all* acts of boycott, coercion or intimidation. Indeed, an examination of the entire legislative history of the McCarran-Ferguson Act shows that at no point was there even the most remote suggestion that § 1013(b) was to be limited to the antitrust acts specified by the court in *Addrisi*.

In view of the importance of this matter and since I believe the holding in *Addrisi* carves out an exemption from the Sherman Act not intended by the Con-

gress, I have prepared the accompanying memorandum which sets forth in detail the entire legislative history of § 1013(b). This legislative history shows beyond peradventure of doubt that Congress intended in enacting § 1013(b) that the Sherman Act encompass *all* antitrust acts of boycott, coercion or intimidation by insurance companies, whether directed against policy holders, insurance agents or others—and not merely antitrust acts among insurance companies and agents for the purpose of boycott or coercion among insurance companies and agents.

Sincerely yours,

EMANUEL CELLER

[The legislative history presented by Mr. Celler is substantially the same as that set forth in the opinion of the First Circuit. *Compare* 555 F.2d at 9-11 (Pet. App. at 12a-16a) *with* 120 Cong. Rec. at 37352-53.]

APPENDIX C

Selection from the Legislative Debates on the Boycott Exception

91 Cong. Rec. 1487 (1945) (colloquy between Senator Pepper and Senator O'Mahoney):

MR. PEPPER. * * * There are other offenses which may be committed under the Sherman Act and under the Clayton Act, in addition to boycott, coercion, and intimidation, are there not?

MR. O'MAHONEY. Yes.

MR. PEPPER. So all the conference report does is to limit the [state] legislatures, in authorizing violation of the Sherman Act and the Clayton Act, only with respect to boycott, coercion, or intimidation. However, all other offenses which are condemned by the Clayton Act or the Sherman Act may, under the proposed legislation, be authorized pursuant to State laws.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 75-0176

DAVID M. BARRY, et al.,
PLAINTIFFS,

– against –

ST. PAUL FIRE & MARINE INSURANCE COMPANY, et al.,
DEFENDANTS.

MOTION OF THE AETNA CASUALTY & SURETY COMPANY TO DISMISS COUNTS I, II AND III OF THE AMENDED COMPLAINT AND FOR SUMMARY JUDGMENT AS TO COUNT IV OF THE AMENDED COMPLAINT

The Aetna Casualty & Surety Company moves that Counts I, II and III of the Amended Complaint be dismissed on the following grounds:

1. Count I fails to state a claim upon which relief may be granted in that the McCarran-Ferguson Act, at 15 U.S.C.A. §1012(b), exempts from the operation of the Clayton Act and the Sherman Act state regulated insurance business.

[Remainder of motion omitted.]

THE AETNA CASUALTY & SURETY COMPANY
by its Attorneys,
(s) THOMAS D. GIDLEY
(s) STEPHEN J. CARLOTTI
HINCKLEY, ALLEN, SALISBURY & PARSONS
2200 Industrial Bank Building
Providence, R.I. 02903

Supreme Court, U. S.
FILED
OCT 14 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-240

ST. PAUL FIRE & MARINE INSURANCE CO., AETNA CASUALTY & SURETY CO., TRAVELERS INDEMNITY OF RHODE ISLAND, TRAVELERS INDEMNITY CO. OF RHODE ISLAND, TRAVELERS INSURANCE CO., HARTFORD CASUALTY COMPANY and HARTFORD FIRE INSURANCE CO.,

Petitioners,

v.

DAVID M. BARRY, M.D., LEROY S. CHAPNICK, M.D., WALTER C. COTTER, M.D., PAUL J. M. HEALEY, M.D., ANTHONY F. MERLINO, M.D., PAUL B. METCALF, M.D., H. GERALD ROCK, M.D., and ROSARIO V. TOMASELLI, M.D.,

and

PENNY ANDREW, CONSTANCE V. BOISSE, CHRISTOPHER DANIELS, ARTHUR H. FERLAND, GLADYS L. SPAIGHT, and ALPHONSE D. VITULLO,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SIDNEY S. ROSDEITCHER
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10022

THOMAS D. GIDLEY
STEPHEN J. CARLOTTI
HINCKLEY, ALLEN,
SALISBURY & PARSONS
2200 Industrial Bank Building
Providence, Rhode Island 02903

Attorneys for The Aetna Casualty and Surety Company

WALKER B. COMEGYS
POWERS & HALL
30 Federal Street
Boston, Massachusetts 02110

KIRK HANSON
HANSON, CURRAN, BOWEN & PARKS
1210 Turks Head Building
Providence, Rhode Island 02903

Attorneys for St. Paul Fire & Marine Insurance Company

CHARLES LISTER
COVINGTON & BURLING
888 16th Street, N. W.
Washington, D. C. 20006

JOSEPH A. KELLY
CARROLL, KELLY & MURPHY
326 Industrial Bank Building
Providence, Rhode Island 02903

Attorneys for Hartford Casualty Company and Hartford Fire Insurance Co.

JOSEPH V. CAVANAGH
HIGGINS, CAVANAGH & COONEY
600 Turks Head Building
Providence, Rhode Island 02903

Attorneys for Travelers Insurance Company

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Petitioners St. Paul Fire & Marine Insurance Company, The Aetna Casualty and Surety Company, Hartford Casualty Company, Hartford Fire Insurance Company and Travelers Insurance Company submit this reply brief in support of their petition for a writ of certiorari.

Respondents, in their brief in opposition, acknowledge the existence of a conflict between the circuits in the interpretation of the boycott exception. However, they argue

that resolution of the conflict is premature because they believe that the First Circuit's opinion will persuade the many courts which have taken a contrary view and thus, in time, erase the conflict which now exists.

This argument is based in part on the appeal said to be pending in the Fifth Circuit in *Royal Drug Co.* v. *Group Life and Health Insurance Co.,* reported below at 415 F. Supp. 343 (W.D. Texas 1976). Respondents suggest that the Court of Appeals for the Fifth Circuit, having "the benefit of the *Barry* and *Proctor* opinions," may well overrule its earlier decision in *Meicler* "within the coming year." (Respondents' Br. at 18-19.) In fact, the Fifth Circuit decided *Royal Drug* on August 8, 1977, without in any way addressing the "boycott" issue or disturbing its prior holding in *Meicler.* 1977-2 Trade Cases (CCH) ¶61,578 (5th Cir. 1977). Rather, the District Court was reversed on the ground that the case did not involve the "business of insurance" within the meaning of the McCarran-Ferguson Act. A petition for rehearing *en banc* with respect to the "business of insurance" issue alone is now pending. Here, all parties agree that the facts of this case involve the "business of insurance."*

Respondents' speculation that the Ninth Circuit may soon use the appeal in *Pastor* v. *Hartford Fire Insurance*

* Respondents also suggest that *Meicler* is not an authoritative statement of the Fifth Circuit view, but merely creates an intra circuit conflict with the Fifth Circuit's earlier decision in *Battle* v. *Liberty National Life Insurance Co.,* 493 F.2d 39 (5th Cir. 1974), *cert. denied,* 419 U.S. 1110 (1975). Even the First Circuit, in its opinion in this case, refused to accept that argument. 555 F.2d at 7. Instead, it expressly acknowledged that *Battle,* which did not involve claims by policyholders, was distinguishable from the claims presented in *Meicler* and in this case.

Co., 1976-1 Trade Cases (CCH) ¶60,783 (C.D. Cal. 1976), *appeal docketed,* No. 77-1243 (9th Cir. Jan. 26, 1977), as a vehicle to overrule its prior decision in *Addrisi* v. *Equitable Life Assurance Society of the United States,* 503 F.2d 725 (9th Cir. 1974), *cert. denied,* 420 U.S. 929 (1975), is similarly unfounded. The only questions presented on appeal in *Pastor* relate to the sufficiency of state regulation and the scope of the "business of insurance" within the meaning of the McCarran-Ferguson Act. The district court's interpretation of the boycott exception, in accord with *Addrisi,* is unchallenged.

We have learned that another case pending in the Ninth Circuit, *Workman* v. *State Farm Mutual Insurance Company,* No. C-75-1799 RFD (N.D. Cal. Sept. 16, 1976), *appeal docketed,* No. 76-3549 (9th Cir. Dec. 1, 1976), does pose questions concerning the proper interpretation of the boycott exception. That case, however, presents antitrust claims raised by providers of insured services, not policyholders. It cannot, therefore, resolve the important issue presented by the petition here, *i.e.,* whether the boycott exception will now be read to allow policyholders to assert grievances about the terms of their insurance, previously addressed to state insurance departments, as federal antitrust claims.

Respondents, finally, fail to suggest any reason to believe that the Third Circuit will repudiate the *Meicler-Addrisi* rule, adopted by it as recently as May 2, 1977. Instead, they deny that that Circuit has ever joined the *Meicler-Addrisi* camp. They misread *Frankford.*

In *Frankford Hospital* v. *Blue Cross,* 417 F. Supp. 1104 (E.D. Pa. 1976) *aff'd* 554 F.2d 1253 (3d Cir. 1977), *cert.*

denied, 46 U.S.L.W. 3218 (U.S. October 3, 1977), the Court of Appeals for the Third Circuit approved *per curiam* a District Court decision which specifically relied on the *Meicler* decision, holding that a broad interpretation of the "boycott" exception, such as that adopted by the Court of Appeals here, would in fact "swallow up the body of the McCarran-Ferguson exemption." 417 F. Supp. at 1110.

The plaintiffs in *Frankford* also read the Third Circuit's decision as we do. In their petition for a writ of certiorari they stated:

> "When it affirmed the district court's decision in the instant case, the Third Circuit implicitly joined the Fifth and Ninth Circuits in the view that those words 'boycott,' 'coercion' and 'intimidation' are to be read as referring only to boycotts and other coercive acts which are directed against insurance companies and their agents by other insurance companies and their agents." Petition at 8.

This Court let stand the *Frankford* decision when it denied certiorari in that case on October 3, 1977. We note that *Frankford* involved a *per curiam* decision, with no discussion of the issues by the Court of Appeals. By contrast, the extensive discussion by the majority and dissenting opinions in this case provide the type of circuit court analysis of the issues so helpful to full review by this Court. Unlike *Frankford,* moreover, it is the result reached in this case which, if allowed to stand, poses the dangers of policyholder suits set forth in our petition.

There is, as shown above, no likelihood that the conflict between the circuits will be resolved unless this Court accepts review here. There is every reason to believe that, absent such review, insurers will continue to be subject to different standards of conduct in different sections of the country. This likelihood is heightened by the fact that the only Court of Appeals decision to take up the meaning of the boycott exception since *Barry—Proctor* v. *State Farm Mutual Automobile Insurance Co.,* 1977-1 Trade Cases (CCH) ¶61,481 (D.C. Cir. 1977)—did in fact recognize dangers in abandoning the *Meicler-Addrisi* rule which the First Circuit rejected, and did in fact create a third standard for decision so as to ameliorate those dangers.*

Finally respondent's perception of the *Barry* decision as a bellwether for future decisions is one which should hasten rather than delay review. So long as it is allowed to stand, *Barry* can be expected to generate a stream of suits brought by policyholders dissatisfied with the terms of their insurance. This increase in federal litigation in an area previously thought the exclusive domain of state insurance departments should not be allowed without review by this Court.

Respondents' brief in opposition is unpersuasive in arguing for avoidance of review at the present time to allow courts in disagreement with the First Circuit to improve upon "the many superficial opinions presently available" and to permit "all of the relevant issues [to be] fully aired in the courts of appeals." (Respondents' Br. at 19.)

---

* The Court of Appeals decision in *Proctor* is analyzed at pages 16-18 of our petition. The Court of Appeals for the District of Columbia has since denied a petition for rehearing *en banc,* No. 76-1183 (D.C. Cir. July 22, 1977), and no petition for a writ of certiorari has been filed.

No less than five Courts of Appeal have already stated their differing interpretation of the boycott exception in clear and unmistakable terms. This Court need not await the generation of yet additional litigation and further appeals before expressing its own opinion on this important question of statutory interpretation.

October, 1977

Respectfully submitted,

SIDNEY S. ROSDEITCHER
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10022

THOMAS D. GIDLEY
STEPHEN J. CARLOTTI
HINCKLEY, ALLEN,
SALISBURY & PARSONS
2200 Industrial Bank Building
Providence, Rhode Island 02903

Attorneys for The
Aetna Casualty and Surety Company

WALKER B. COMEGYS
POWERS & HALL
30 Federal Street
Boston, Massachusetts 02110

KIRK HANSON
HANSON, CURRAN, BOWEN & PARKS
1210 Turks Head Building
Providence, Rhode Island 02903

Attorneys for
St. Paul Fire & Marine
Insurance Company

CHARLES LISTER
COVINGTON & BURLING
888 16th Street, N. W.
Washington, D. C. 20006

JOSEPH A. KELLY
CARROLL, KELLY & MURPHY
326 Industrial Bank Building
Providence, Rhode Island 02903

Attorneys for
Hartford Casualty Company and
Hartford Fire Insurance Co.

JOSEPH V. CAVANAGH
HIGGINS, CAVANAGH & COONEY
600 Turks Head Building
Providence, Rhode Island 02903

Attorneys for
Travelers Insurance Company

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Respondents.

BRIEF FOR PETITIONERS

SIDNEY S. ROSDEITCHER
HOWARD S. VEISZ
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10022

THOMAS D. GIDLEY
STEPHEN J. CARLOTTI
HINCKLEY, ALLEN,
SALISBURY & PARSONS
2200 Industrial Bank Building
Providence, Rhode Island 02903

Attorneys for The Aetna Casualty and Surety Company

CHARLES LISTER
JONATHAN M. WEISGALL
COVINGTON & BURLING
888 16th Street, N. W.
Washington, D. C. 20006

JOSEPH A. KELLY
CARROLL, KELLY & MURPHY
326 Industrial Bank Building
Providence, Rhode Island 02903

Attorneys for Hartford Casualty Company and Hartford Fire Insurance Company

WALKER B. COMEGYS
POWERS & HALL
30 Federal Street
Boston, Massachusetts 02110

KIRK HANSON
HANSON, CURRAN & PARKS
1210 Turks Head Building
Providence, Rhode Island 02903

Attorneys for St. Paul Fire & Marine Insurance Company

JOSEPH V. CAVANAGH
HIGGINS, CAVANAGH & COONEY
600 Turks Head Building
Providence, Rhode Island 02903

Attorneys for Travelers Insurance Company

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BRIEF FOR PETITIONERS

Petitioners St. Paul Fire & Marine Insurance Company, The Aetna Casualty and Surety Company, Hartford Casualty Company, Hartford Fire Insurance Company and Travelers Insurance Company ask this Court to reverse the judgment of the United States Court of Appeals for the First Circuit entered in this case on May 16, 1977.

Opinions Below

The opinion of the Court of Appeals for the First Circuit is reported at 555 F.2d 3, 1977-1 Trade Cases (CCH) ¶61,431. The opinion of the United States District Court for the District of Rhode Island, which dismissed plain-

tiffs' antitrust claim, has not been reported.* The District Court and Court of Appeals opinions are reproduced at pages 39-50 and 51-71 of the Appendix. The dissenting opinion of Judge Campbell may be found at pages 72-75 thereof.

Jurisdiction

The Court of Appeals entered judgment on May 16, 1977. A petition for a writ of certiorari was timely filed on August 12, 1977. Certiorari was granted on October 31, 1977. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Statutes Involved

Section 1 of the Sherman Act, 15 U.S.C. §1 (Supp. V, 1975):

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

Section 1 of the McCarran-Ferguson Act, 15 U.S.C. §1011 (1970):

> "Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

* In a second opinion, entered on March 19, 1976, the District Court dismissed state law claims asserted by plaintiffs in a second amended complaint. That opinion was affirmed by the Court of Appeals for the First Circuit and review of that aspect of the decision has not been sought.

Section 2 of the McCarran-Ferguson Act, 15 U.S.C. §1012 (1970):

> "(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> "(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance; *Provided,* That after June 30, 1948, the . . . Sherman Act, and the . . . Clayton Act, and . . . the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

Section 3 of the McCarran-Ferguson Act, 15 U.S.C. §1013 (1970):

> "(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.
>
> "(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

Question Presented

This case presents an important question concerning the scope of the antitrust exemption conferred on the business of insurance by the McCarran-Ferguson Act.

The Court is asked to resolve a conflict among the circuits concerning the extent to which an exception to the Act for "boycott, coercion or intimidation" may be used to overcome the antitrust exemption and involve federal courts in controversies between policyholders and insurance companies concerning the terms of insurance, notwithstanding the policy of the Act to leave such controversies to state regulation.

The question presented is whether the boycott exception may be read to permit policyholders dissatisfied with the terms of insurance to convert their grievances into a federal antitrust suit by alleging a concerted refusal by insurance companies to sell them the coverage they want.

Statement of the Case

1. Introduction

The McCarran-Ferguson Act was enacted in 1945 in response to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which, for the first time, held that the federal antitrust laws applied to the business of insurance. The Act was designed in part to reverse that decision and "turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 459 (1969).

To that end, the Act renders the Sherman Act and other federal antitrust laws inapplicable to the business of insurance, to the extent regulated by the states, except where the conduct challenged involves "boycott, coercion or intimidation."

In this case, the First Circuit adopted an interpretation of the boycott exception which threatens to nullify the antitrust exemption and, in the words of the dissenting opinion, "reintroduce by the back door most of the Sherman Act" to the area of insurer-insured relations which Congress sought to leave to state regulation. (555 F.2d at 14-15, A. 73-74.)

In a two-to-one decision, the First Circuit held that Rhode Island physicians could bring a federal antitrust suit charging that the allegedly high cost and limited scope of medical malpractice coverage were the result of an insurance company conspiracy. The First Circuit held that the McCarran-Ferguson antitrust exemption was no bar to this suit because allegations characterizing the alleged conspiracy as a concerted refusal to deal with the policyholders brought the case within the boycott exception.

All other courts which have considered the issue have reasoned that such a reading of the boycott exception would swallow up the rule since virtually every Sherman Act conspiracy could be framed in the language of a concerted refusal to deal. Therefore, in order to give meaning to the antitrust exemption, these courts have limited the exception

to blacklists and other coercive tactics directed at insurance companies and agents—Congress' main concern at the time it enacted the exception—or to similar conduct undertaken to restrict the competitive practices of other traders.

In rejecting these limitations, the First Circuit has virtually read the Sherman Act exemption out of the McCarran-Ferguson Act and has converted the federal antitrust laws into a remedy for policyholder grievances heretofore considered to be within the exclusive domain of the states. As shown below, neither the common meaning of the term "boycott," nor the history of the boycott exception, nor the overall policy of the Act, justifies this result.

2. The Antitrust Allegations

Plaintiffs purport to represent a class of Rhode Island physicians and a class of their present or prospective patients. The first count of their amended complaint (A. 15-30), brought under the Sherman Act, alleges a conspiracy among St. Paul, by whom the plaintiff physicians had been insured for malpractice, and Aetna, Hartford and Travelers.

According to the complaint, in April, 1975, St. Paul announced that it would not renew medical malpractice coverage on an "occurrence" basis and would issue new coverage only on a "claims made" basis.* Plaintiffs allege that thereafter Aetna, Hartford and Travelers refused to issue any malpractice coverage to physicians previously covered by St. Paul, as part of a collective effort to deny St. Paul policyholders medical malpractice coverage on an "occurrence" basis. (A. 24-25.)

* An "occurrence" basis policy covers claims arising out of acts occurring during the term of the policy even when the claim is made after the policy expires. "Claims made" policies cover only claims actually asserted while the policy is in force, thus precluding liability for potential claims after the policy expires.

The complaint also describes the alleged conspiracy as an agreement not to compete, price-fixing and unfair discrimination between insureds, and contains the customary recitation in cases of this kind, that the conduct alleged amounted to boycott, coercion and intimidation. (A. 27.)

Plaintiffs seek damages and equitable relief, including an injunction prohibiting the insurance companies from denying plaintiffs "medical malpractice insurance on an 'occurrence basis' at reasonable rates. . . ." (A. 28.)

3. The Decisions Below

The District Court granted a motion to dismiss these antitrust allegations, holding that they were barred by the McCarran-Ferguson exemption. There was no dispute that the conduct alleged related to the "business of insurance." Nor was there any question that the conduct was regulated by Rhode Island.

Rhode Island has a comprehensive code regulating the terms and rates of insurance and all other phases of the insurance business, including anticompetitive and unfair practices.

More specifically, Rhode Island has undertaken a major effort to remedy problems in the cost and availability of medical malpractice insurance through special emergency

regulation. Commencement of this suit virtually coincided with the formation by Rhode Island of a Joint Underwriting Association ("JUA"), which took over the business of writing medical malpractice coverage in Rhode Island. The JUA was granted full authority to establish terms and rates for such coverage, pending the outcome of a study undertaken by a Governor's Commission on Medical Malpractice Reform.*

Plaintiffs argued, however, that the McCarran-Ferguson Act did not preclude them from seeking a separate federal solution because, they contended, the conduct alleged came within the boycott exception. The District Court rejected this argument, relying on the Fifth Circuit's decision in *Meicler* v. *Aetna Casualty & Surety Co.*, 506 F.2d 732 (5th Cir. 1975), and the Ninth Circuit's decision in *Addrisi* v. *Equitable Life Assurance Society of the United States*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975).

These Courts of Appeals held that the legislative history of the boycott exception indicated that Congress intended to exclude only a limited type of activity from the otherwise broad antitrust exemption. They read this history as showing that Congress added the boycott exception primarily to deal with insurance company conspiracies which used blacklists and similar punitive acts to exclude other

* The JUA was created by Emergency Regulation XXI, R.I. Dep't of Business Regulation, Insurance Division, June 16, 1975 (A. 114-27), and received express legislative sanction in R.I. Gen. Laws §42-14.1-1 (A. 106-10). Rhode Island's comprehensive regulation of the business of insurance in general is illustrated by R.I. Gen. Laws §§27-9-4, 27-9-7, 27-9-15, 27-9-16, 27-9-18, and 27-9-19, setting forth requirements and procedures for state approval of the terms of insurance policies (A. 86-90), and by R.I. Gen. Laws §§27-29-1 *et seq.*, broadly prohibiting "unfair competition and practices" in the "business of insurance" (A. 92-105).

insurance companies or agents from the insurance business, or to compel them to conform their competitive practices to rules laid down by the conspiracy.

The District Court adopted the reasoning of these Courts of Appeals that to read the exception to encompass policyholder complaints about the unavailability of insurance on terms which they desired "would be contrary to the legislative history of the Act," and " 'would vitiate the McCarran-Ferguson Act in its concept of setting over unto the several states the regulation, and protection of the insurer-insured relationship.' " (A. 45.) By the time the appeal from the District Court reached the First Circuit, at least six additional district courts had adopted the Fifth and Ninth Circuit construction of the boycott exception.

The First Circuit rejected these decisions and reversed. Over Judge Campbell's dissent, it held that the allegations of a concerted refusal to deal with policyholders brought the case within the boycott exception.

The First Circuit majority concluded that the prior decisions were in error for two reasons: First, the Court held that the earlier decisions erroneously went behind the words of the boycott exception and relied upon its legislative history. In the majority's view, the "plain meaning" of the phrase "boycott, coercion and intimidation" encompassed policyholder claims of "[c]oncerted refusals by a number of companies to sell malpractice insurance policies to doctors who were dissatisfied with the policies offered by their insurer . . . ." (555 F.2d at 7-8, 11, A. 57-58, 66.)

The majority seemed to acknowledge that under its reading the only Sherman Act claims which could not be brought within the boycott exception were acts of individual monopolists, such as predatory pricing and the use of "benign" means to maintain a monopoly. (555 F.2d at 8, A. 59.) It concluded, however, that this would not result in undue interference with state regulation since, in its view, the states could still enact regulations specifically authorizing conduct otherwise covered by the boycott exception—not because of the McCarran-Ferguson Act, but under the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943).

Second, the majority concluded that the prior decisions had misread the legislative history of the boycott exception when they found that Congress was solely concerned with a system of boycotts and blacklists aimed at forcing insurance companies and agents to conform to a system of industry self-government. The majority conceded that the legislative history made no mention of boycotts, coercion or intimidation aimed at consumers, and that the history disclosed that "the vice of insurance company self-government outside the law obviously lay in [the legislators'] minds as a major evil . . . ." (555 F.2d at 12, A. 67.) It concluded, however, that "there is no suggestion that the legislation was limited to that evil." (*Id.*)

Judge Campbell entered a vigorous dissent. In his view, the majority's interpretation of the exception rendered virtually meaningless the McCarran-Ferguson exemption from the Sherman Act:

> "[U]nder the clear implication of §1012, neither the Sherman Act nor the other antitrust laws apply

> except insofar as the §1013(b) exception permits. That exception provides, 'Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.' Significantly this language does not track the broad 'contract, combination . . . or conspiracy' language of the Sherman Act which Congress reasonably might have chosen had the intent been, as my brothers state, to encompass in the exception virtually all activities in violation of the Sherman Act involving more than an individual monopolist.
>
> ". . . Indeed to read §1013(b) expansively is to hold that what Congress gave with one hand it took with the other, since while my brothers' reading does not introduce the entirety of federal antitrust law into the business of insurance, it introduces a very major part thereof and does so with no clear explanation of why Congress should first take pains to eliminate the antitrust laws and then reintroduce by the back door most of the Sherman Act." (555 F.2d at 14-15, A. 72-74.)

Moreover, Judge Campbell viewed the majority decision as subversive of the main objective of the McCarran-Ferguson Act:

> "The central thread running through the McCarran-Ferguson Act is that regulation of insurance rates and policies—both of them matters falling under the general heading of relations between companies and policyholders—is left to the states. The present litigation brought by physicians who believe that they have been deprived, unfairly, of insurance on terms that are economically favorable focuses precisely upon company-policyholder matters. My brothers are now putting the federal courts in the same arena as the State of Rhode Island, contrary, I believe, to the pur-

pose of the McCarran-Ferguson Act. Doubtless the federal perspective is somewhat different but the potential for conflict between state regulation and federal antitrust policies is real and the decision has the effect of substantially undercutting §1012(b) of the Act." (555 F.2d at 15, A. 74-75.)

Finally, Judge Campbell's dissent noted with concern the radical change which the majority's interpretation effected in the role of the federal courts and its potential impact on state regulation of insurance:

> "This is, I think, a most unfortunate decision. It not only introduces a new category of federal antitrust suit which will be very difficult to manage at a time when federal courts are strained to the limit, but it could have unforseeable effects upon state regulatory policies. Plaintiffs may see this case as another string to their bow in attempting to deal with the crushing malpractice burdens being imposed as the result not only, perhaps, of predatory insurance practices but of inflated claims and verdicts. We might sympathize with them without going this far. The State of Rhode Island has apparently now enacted regulatory legislation dealing with some or all of the problem—a means of redress which seems far more responsive to the problem than any likely to be achieved through reinterpreting the McCarran-Ferguson Act thirty years after enactment." (555 F.2d at 15, A. 75.)

Summary of Argument

The "plain meaning" of the term boycott does not compel the First Circuit's novel interpretation of the boycott exception. This Court has used the term boycott in decisions under the Sherman Act to apply to concerted refusals to deal which were designed to exclude some trader from

competition with one or more of the conspirators or to compel a trader to conform its competitive practices to terms dictated by the conspiracy. The term "boycott" has never been used to apply to conduct of the kind complained of here, involving no more than an alleged voluntary agreement by insurance companies to fix the terms of their product or to refrain from competing for each other's customers.

As all other courts have recognized, to bring such conduct within the boycott exception by characterizing it as a concerted refusal to deal with policyholders would erase all distinctions between alleged conspiracies concerning the terms of insurance, which Congress plainly intended to include within the McCarran-Ferguson antitrust exemption, and the conduct covered by the boycott exception. The exception would thus effectively swallow up the entire antitrust exemption and subvert the main purpose of the act: to bar application of the federal antitrust laws where the states regulate the relations between policyholders and insurance companies.

The limitations imposed on the boycott exception by these other courts find support in the history of the McCarran-Ferguson Act and prior decisions of this Court. More important, they define the exception in a manner which gives meaning to the entire Act. Accordingly, the First Circuit's interpretation of the boycott exception should be rejected, and the exception should be limited to cases where concerted refusals to deal are used to exclude or penalize insurance companies or other traders which refuse to conform their competitive practices to terms dictated by the conspiracy.

ARGUMENT

I

The First Circuit's interpretation of the boycott exception would encompass almost every conspiracy proscribed by the Sherman Act and thus nullify the Sherman Act exemption provided by the McCarran-Ferguson Act.

There is no question that the McCarran-Ferguson Act was designed to render the Sherman Act inapplicable to the business of insurance except in limited circumstances.

Section 3(a) of the McCarran-Ferguson Act (15 U.S.C. §1013(a)) specifically provides that "the Sherman Act . . . shall not apply to the business of insurance or to acts in the conduct thereof" for a period ending June 30, 1948. This Sherman Act exemption is extended indefinitely by section 2(b) of the McCarran-Ferguson Act (15 U.S.C. §1012(b)) in any state which, like Rhode Island, has undertaken to regulate the business of insurance.

Hence, the exception for "boycott, coercion or intimidation" must be limited to a defined class of conduct which does not encompass every "contract, combination . . . or conspiracy" covered by the Sherman Act. Otherwise, the provisions of the McCarran-Ferguson Act rendering the Sherman Act inapplicable to the business of insurance would have no meaning.

The First Circuit adopted an interpretation of the boycott exception which ignores this fundamental proposition.

It held that the boycott exception applies to any conspiracy which can be characterized as a concerted refusal to deal, thus allowing the exception to encompass virtually every conspiracy proscribed by the Sherman Act.

As Professor Sullivan has said, "the phrase 'concerted refusal to deal' is too imprecise to be very useful as a legal category. . . . Literally, it covers arrangements which are very different from boycotts and which should be analyzed quite differently." Sullivan, *Handbook of the Law of Antitrust* 231 (1977). And Professor Areeda has noted that "one might even hold that any agreement affecting competitive behavior is necessarily an agreement that the collaborators will not buy or sell on any other terms; and there is no sharp logical distinction between refusing to sell at all and refusing to sell except on condition." Areeda, *Antitrust Analysis* 380-81 (2d ed. 1974).* Thus, allowing the applicability of the boycott exception to turn on the allegation of a "concerted refusal to deal" alone will erase the distinction between boycotts and other categories of conduct expressly exempted from the Sherman Act by the McCarran-Ferguson Act.

For example, an agreement establishing uniform risk classifications can be characterized as a concerted refusal to deal with persons found to be unacceptable risks. An agreement not to compete can be transformed into a concerted refusal to deal with another's customers. An agreement not to engage in product competition can be described as a refusal to sell products differing from those agreed upon. And a price fixing conspiracy can be cast in terms

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* *See also* Barber, *Refusals To Deal Under The Federal Antitrust Laws*, 103 U.Pa.L.Rev. 847, 876-77 (1955).

of a concerted refusal to deal except on terms dictated by the conspirators.

Here the First Circuit held that an alleged conspiracy whereby one insurer offered to renew malpractice coverage to its policyholders on terms less favorable than those offered in the past, and whereby other insurers refused to sell to those policyholders when they sought to obtain new coverage elsewhere, came within the boycott exception. But this conduct could more conventionally have been described as an agreement to fix the terms of malpractice coverage or as an agreement between the insurance companies not to compete for each other's customers. Indeed plaintiffs use these very terms to characterize the alleged conduct, in addition to calling it a "boycott." (A. 27.)

Every other court confronted with similar attempts by policyholders to bring grievances about the terms of their insurance within the boycott exception has sought to avoid the anomaly which the First Circuit's interpretation produces. These courts have looked to the historical and legislative background of the McCarran-Ferguson Act to find an appropriate limitation on the boycott exception which would prevent it from swallowing up the antitrust exemption.

For example, in *Meicler* v. *Aetna Casualty & Surety Co.*, 506 F.2d 732 (5th Cir. 1975), *aff'g* 372 F.Supp. 509 (S.D. Tex. 1974), policyholders complained that their insurance company refused to renew an automobile liability policy on terms which they thought reasonable, and that all other insurers within the state conspired with that company to refuse to sell policies to them on their former, more advantageous terms. In an effort to bring their claim within the boycott exception, plaintiffs framed their claim as a collective refusal to deal, except on terms which the insurance companies dictated. The District Court rejected the attempt. In its view, the legislative history of the boycott exception revealed that Congress was primarily seeking to deal with conspiracies among insurance companies to boycott or refuse to deal with other insurance companies and agents. It found nothing to suggest that the boycott exception was intended to apply to "a refusal by insurance companies to deal with particular segments of the public except under fixed classifications and premium rates." (372 F.Supp. at 513-14.)

On appeal, the Fifth Circuit unanimously affirmed, stating that:

> "[Plaintiff's] broad construction of Section 1013(b) would emasculate the antitrust exemption contained in Section 1012(b) of the McCarran-Ferguson Act. We affirm the district court's holding that the boycott exception does not apply." (506 F.2d at 734.)

The Fifth Circuit's view has also been adopted by the Ninth Circuit in *Addrisi* v. *Equitable Life Assurance Society of the United States*, 503 F.2d 725 (9th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975), and the Third Circuit implicitly adopted this construction in its *per curiam* affirmance in *Frankford Hospital* v. *Blue Cross of Greater Philadelphia*, 417 F. Supp. 1104 (E.D. Pa. 1976), *aff'd*, 554 F.2d 1253 (3d Cir.), *cert. denied*, 46 U.S.L.W. 3218 (U.S. Octo-

ber 4, 1977). In addition, ten District Court decisions have adopted the same construction.*

A somewhat different approach—which also avoids the anomalous results produced by the First Circuit's interpretation—recently was advanced by the District of Columbia Circuit in *Proctor* v. *State Farm Mutual Automobile Insurance Co.*, 561 F.2d 262 (D.C. Cir. 1977), *petition for cert. filed*, No. 77-580, 46 U.S.L.W. 3294 (U.S. October 19, 1977).**

Proctor involved a suit by tradesmen in the auto repair business who claimed that insurance companies conspired with other auto repairmen to limit payments made to insureds for auto repairs covered by their automobile insurance contracts. Plaintiffs claimed that the effect of this conspiracy was to limit the prices they could charge these policyholders for auto repairs. A principal issue in *Proctor* was whether the auto repairmen's claim that the conspiracy involved a collective refusal to deal except at fixed terms

* *Pierucci* v. *Continental Casualty Co.*, 418 F. Supp. 704 (W.D. Pa. 1976) (involving an attack on "claims made" policies similar to the one involved here); *Ohio* v. *Ohio Medical Indemnity, Inc.*, 1976-2 Trade Cases (CCH) ¶61,128 (S.D. Ohio 1976); *Mathis* v. *Automobile Club Inter-Insurance Exchange*, 410 F. Supp. 1037 (W.D. Mo. 1976); *Royal Drug Co.* v. *Group Life and Health Insurance Co.*, 415 F. Supp. 343 (W.D. Tex. 1976), *rev'd on other grounds*, 556 F.2d 1375 (5th Cir. 1977); *Pastor* v. *Hartford Fire Insurance Co.*, 1976-1 Trade Cases (CCH) ¶60,783 (C.D. Cal. 1976), appeal docketed No. 77-1243 (9th Cir. January 26, 1977); *McIlhenny* v. *American Title Insurance Co.*, 418 F. Supp. 364 (E.D. Pa. 1976); *Workman* v. *State Farm Mutual Automobile Insurance Co.*, Civil No. 75-1799 (N.D. Cal. September 16, 1976), appeal docketed No. 76-3549 (9th Cir. December 1, 1976); *Seasongood* v. *K&K Insurance Agency*, 414 F. Supp. 698 (E.D. Mo. 1976), *rev'd on other grounds*, 548 F.2d 729 (8th Cir. 1977); *Mitgang* v. *Western Title Insurance Co.*, 1974-2 Trade Cases (CCH) ¶75,322 (N.D. Cal. 1974); and *Transnational Insurance Co.* v. *Rosenlund*, 261 F. Supp. 12 (D. Ore. 1966).

** The petition in *Proctor* does not present an issue concerning the scope of the boycott exception.

fell within the boycott exception. The District of Columbia Circuit found that it did not.

Although the Court was unwilling to accept the Fifth and Ninth Circuits' view that the boycott exception was limited to boycotts of other insurance companies and their agents, it did "recognize that the terms of the [boycott] provision are not self-defining, and are capable of being read in such a way as to swallow the antitrust exemption ...." (561 F.2d at 274.) It recognized, for example, that a price-fixing conspiracy could "perhaps be characterized as a collective refusal to deal except at the prevailing rate." (*Id.*) But, it also found that the boycott exception could not be read so expansively because the legislative history clearly indicated that price-fixing was not considered a boycott, and that such conduct fell squarely within the McCarran-Ferguson exemption. (*Id.*)

The District of Columbia Circuit looked to the conduct described by the words boycott, coercion and intimidation in *South-Eastern Underwriters*,* and limited the boycott exception to the type of punitive conduct used by the conspirators in that case to exclude from the market traders who would not conform their competitive practices to rules laid down by the conspiracy. This reading differs from the Fifth and Ninth Circuits' construction in that it allows the boycott exception to be applied to acts aimed at excluding or coercing the competitive practices of traders outside the insurance industry. But, like the Fifth and Ninth Circuits' construction, it would distinguish between boycotts and other Sherman Act conspiracies. Under *Proctor*, the boy-

* *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

cott exception would not encompass allegations, like those here, involving no more than a claim that competitors voluntarily entered into a horizontal conspiracy to restrain competition among themselves—even if the conspiracy were styled as a concerted refusal to deal.

The different approach taken by the First Circuit reflects its initial premise that the "plain meaning" of the term "boycott" encompasses every conspiracy which can be characterized as a concerted refusal to deal. Even if this premise were correct, the First Circuit was not justified in adopting an interpretation of the except on which emasculates the express Sherman Act exemption conferred by the McCarran-Ferguson Act. As this Court has said, "[t]he process of interpretation . . . misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve." *Markham* v. *Cabell,* 326 U.S. 404, 409 (1945). As we show in Point II, however, the First Circuit was mistaken in its premise. Its all-encompassing reading of the exception was not compelled by the "plain meaning" of the term "boycott" as used by this Court in cases under the Sherman Act. In fact, the limitations on the boycott exception imposed by other courts are more consistent with the meaning of the term "boycott" as used by this Court, than is the interpretation adopted by the First Circuit.

II

The "plain meaning" of the word boycott does not warrant an interpretation of the boycott exception which swallows up the McCarran-Ferguson antitrust exemption.

This Court has never used the term boycott to characterize conduct of the kind alleged here involving voluntary agreements among competitors to restrict competition among themselves, even though such arrangements could be characterized as a collective refusal to deal. The hallmark of every boycott case decided by this Court under the Sherman Act has been the use of a concerted refusal to deal for the purpose of excluding the target of the boycott from competition with one or more of the conspirators or restraining the competitive practices of the target.*

A perfect illustration is *Klor's Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959), which the First Circuit mistakenly read to support its broad definition of boycott. (555 F.2d at 7, A. 57.) In that case, Broadway-Hale, a retail department store chain, sought to prevent Klor's from competing with one of its stores in the sale of appliances. To that end Broadway-Hale induced appliance manufacturers to refuse to sell to Klor's or to sell to Klor's only on terms which put it at a disadvantage to Broadway-Hale. Such exclusionary activity, this Court held, fell within the category of "group boycotts, or con-

* Barber, *Refusals to Deal Under the Antitrust Laws,* 103 U.Pa. L.Rev. 847, 876-77 (1955); Note, *Boycott: A Specific Definition Limits the Applicability of a Per Se Rule,* 71 Nw.U.L.Rev. 818 (1977).

certed refusals by traders to deal with other traders." (359 U.S. at 212.)

Similarly, in *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966), franchised automobile dealers sought to eliminate competing automobile "discount houses" by inducing General Motors to take action to prevent discounters from obtaining cars. The conduct condemned as a boycott involved "joint, collaborative action by dealers, the appellee associations, and General Motors to eliminate a class of competitors by terminating business dealings between them and [the] minority of Chevrolet dealers [which sold cars to discounters] and to deprive franchised dealers of their freedom to deal through discounters if they so chose." (384 U.S. at 140.)

It was the "[e]limination, by joint collaborative action, of discounters from access to the market" (384 U.S. at 145), and acts undertaken for the purpose of "exclu[ding] traders from the market by means of combination or conspiracy" (384 U.S. at 146), which led this Court to characterize the conduct as an illegal boycott.

Again, in *Fashion Originators' Guild of America* v. *FTC*, 312 U.S. 457 (1941), dress designers and manufacturers which were members of the Guild were accused of conspiring to use the coercive force of a group boycott to eliminate competition from manufacturers that copied defendants' designs and undercut defendants' prices. In describing the conduct which it condemned as a group boycott, the Court said:

> "[P]etitioners, while continuing to compete with one another in many respects, combined among themselves to combat and, if possible, destroy all competition from the sale of garments which are copies of their 'original creations.' They admit that to destroy such competition they have in combination purposely boycotted and declined to sell their products to retailers who follow a policy of selling garments copied by other manufacturers from designs put out by Guild members. . . ." (312 U.S. at 461.)

All other boycott cases decided by this Court—like those described above—have involved concerted refusals to deal which had as their objective the exclusion of competitors or the restriction of the target's competitive practices. *See, e.g., Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600 (1914) (retail lumber dealers "blacklisted" wholesalers who attempted to sell to consumers in competition with the conspiring dealers); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (gas burner manufacturers induced a trade association to withhold a seal of approval from products manufactured by one of their competitors, thus making it impossible for that manufacturer to sell burners in competition with the conspirators); *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963) (members of the New York Stock Exchange cut off wire service to a competing non-member broker). *See also, Associated Press* v. *United States*, 326 U.S. 1, 15-16 (1945) (member newspapers of the Associated Press excluded non-members from access to news coverage so as to impair the ability of these non-member newspapers to compete with the conspirators).

Here, no conduct comparable to that involved in these boycott cases is alleged. Nothing more is alleged than a conspiracy among insurance companies to voluntarily limit

competition among themselves. There is no allegation that the coercive force of a refusal to deal was brought against any insurance company to compel it to join the alleged conspiracy. Nor is there any allegation that the refusal to deal was induced by some physicians in order to eliminate the competition of doctors insured by St. Paul.

Accordingly, the First Circuit was in error when it concluded that the conduct involved here fell within the "plain meaning" of the term "boycott." Nothing in the plain meaning of the term boycott warrants an interpretation of the boycott exception which would bring virtually every "contract, combination . . . or conspiracy" covered by the Sherman Act within the boycott exception.

III

The history of the boycott exception shows that it is limited to concerted refusals to deal aimed at excluding insurance companies or other traders from competition or restricting their competitive practices.

The history of the boycott exception demonstrates that the conduct with which Congress was concerned was of the same type as that described in the boycott cases and that Congress did not intend to bring within the exception conduct of the type alleged here.

The phrase "boycott, coercion or intimidation" appears to have been taken by Congress from this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which led to the enactment of the McCarran-Ferguson Act. There, the Court used the words

boycott, coercion and intimidation to apply to conduct of the type involved in *Fashion Originators' Guild, Klor's,* and all other boycott cases decided by this Court.

South-Eastern Underwriters involved a conspiracy among members of a trade association of insurance companies and agents to establish the terms on which fire insurance could be sold. In addition, the conspirators agreed to the use of boycotts, blacklists and other punitive activity to coerce competing insurance companies and agents to adhere to those terms and exclude from competition companies and agents which were not members of the association or which would not sell insurance on the terms fixed by the conspiracy.

This Court distinguished between the agreements among the conspirators to fix the terms on which insurance would be sold and the coercive measures adopted by the conspirators to force other insurance companies and agents into the conspiracy or out of the business. It was only to this latter category of activity to which the words boycott, coercion and intimidation were applied.

Thus the Court said:

> "The conspirators *not only fixed premium rates* and agents' commissions, but employed *boycotts* together with other types of *coercion and intimidation* to force non-member insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from S.E.U.A. members on S.E.U.A. terms. Companies not members of S.E.U.A. were cut off from the opportunity to reinsure their risks, and their services and facilities were disparaged; independent sales agencies who defiantly represented non-S.E.U.A. com-

panies were punished by a withdrawal of the right to represent the members of S.E.U.A.; and persons needing insurance who purchased from non-S.E.U.A. companies were threatened with boycotts and withdrawal of all patronage." (322 U.S. at 535-36.) (Emphasis supplied.)*

A review of the legislative history of the McCarran-Ferguson Act shows that the exception for "boycott, coercion or intimidation" was intended to deal with the same type of conduct which this Court characterized by those words in *South-Eastern Underwriters.*

Thus, Senator O'Mahoney, one of three Senators on the Conference Committee which drafted the boycott exception, stated its object and origins as follows:

> "The vice in the insurance industry, Mr. President, was not that there were rating bureaus [which fixed rates], but that there was in the industry a system of private government which had been built up by a

* The First Circuit seized upon this Court's references in this quotation to acts against consumers, to demonstrate that the conduct alleged here falls within the conduct comprehended by this Court's use of the words "boycotts . . . coercion and intimidation." (555 F.2d at 11, A. 66-67.) In context, however, it is clear that the targets of the conspiracy were not the policyholders but the non-member insurance companies and agents. The refusals to sell to policyholders were only part of the effort to pressure non-member insurance companies and agents into conformity or withdrawal from the market.

The First Circuit was similarly mistaken in relying upon *Washington State Bowling Prop. Ass'n* v. *Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir.), *cert. denied*, 384 U.S. 963 (1966). (555 F.2d at 8-9 n.4, A. 58 n.4.) There, the owner of a bowling establishment brought suit against competing establishments and their trade association alleging that defendants conspired to "deprive non-member establishments of the patronage of persons who wish to engage in organized bowling, to enforce a boycott against non-member establishments, and thereby to suppress competition and monopolize the bowling industry." (356 F.2d at 374.)

> small group of insurance companies, which companies undertook by their agreements and understandings to invade the field of Congress to regulate commerce. These private groups sought, by the imposition of penalties, by writing rules and regulations, and by holding secret trials, or at least claiming the right to do so, to enforce not public regulations written by public authority but regulations for the insurance business which they wrote themselves in their wholly private and exclusive associations.
>
> • • •
>
> "The Insurance Executives Association undertook by regulation to coerce, intimidate, and boycott its own members and compel them to obey the rules and regulations the association itself prescribed." (91 Cong. Rec. 1485-86 (1945).)

Senator O'Mahoney then read from the regulations of the Association which provided for the imposition of penalties including expulsion from membership, the payment of fines, and withdrawal of certain business should members disobey the Association's directives, and concluded that

> "such is the record of one agreement to coerce and intimidate persons engaged in the insurance business.
>
> • • •
>
> "[T]his proposed act leaves wholly undisturbed, indeed, it fortifies the decision of the Supreme Court that insurance is commerce. It leaves the antitrust laws in full force and effect, even during the moratorium period, against boycotts and agreements to boycott. As I was saying, it is a matter of confronting the facts or arguing on theory. There are agreements and combinations in the public interests which can safely be permitted, but this agreement from which I have been

> reading is the sort of agreement which ought to be condemned, which ought to be outlawed, and which, in the language of section 3(b) of the conference report, which the Senator has now read, would be completely outlawed. I refer to the prohibition against agreements to coerce or intimidate." (91 Cong. Rec. 1486 (1945).)

Throughout the debates, Senator O'Mahoney repeatedly answered questions about the scope of the boycott exception by referring to coercive conduct which had been employed by the insurance industry to compel conformity to its private rules and regulations. For example at one stage of the discussion he stated:

> "Therefore any attempt by a small group of insurance companies to enter into an agreement by which they would penalize any person or any business which was attempting to do business in the insurance field in a way that was disapproved by them, would be absolutely prohibited by this provision [the "boycott" exception]." (91 Cong. Rec. 1480 (1945).)

He again explained:

> "Mr. President, there are three forms of regulation. There is State regulation, concerning which the Senator from Maryland has spoken so clearly. There is Federal regulation as a legal possibility, but no one is urging it now.
>
> "The third, and this has been harmful to the public interest, is regulation by private combinations and groups; a type of regulation which has been enforced by private combinations and groups through private rules and regulations under which persons engaged by the insurance industry could be tried and convicted for the violation of private law. That type of regulation would be absolutely outlawed should the conference report be adopted." (91 Cong. Rec. 1483 (1945).)

Even the First Circuit majority recognized that the legislative history shows that "the vice of insurance company self-government outside the law obviously lay in [the legislators'] minds as a major evil to be combatted by the legislation . . ." (555 F.2d at 12, A. 67) and that "it is true that at no point were any remarks directed to the possibility of boycotts, coercion or intimidation aimed at consumers." (555 F.2d at 11, A.66.) The legislative history provides no support for the First Circuit's conclusion that the boycott exception was intended to be an "all purpose safety valve" (555 F.2d at 11-12, A. 67) which would sweep within the exception virtually every Sherman Act conspiracy, notwithstanding the express exemption conferred by the McCarran-Ferguson Act.

This Court has recognized that "words" used in statutes "acquire scope and function from the history of events which they summarize." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 186 (1941). The legislative debates show that in enacting the boycott exception Congress was concerned with blacklists and similar punitive measures used by members of an industry to compel other traders to conform their competitive practices to those dictated by the conspiracy or to be excluded from competition. This was the conduct characterized as a boycott in *South-Eastern Underwriters* and other boycott cases that have been decided by this Court under the Sherman Act.

The sound approach to this history is the one suggested by Judge Campbell in his dissent:

> "Certainly, in the expressed concerns of the legislators there is explicit support for the view which all other

courts have adopted to date. More important to me, however is the statutory scheme which suggests in the positioning of the exception, and in the very fact that the exception is just that, that §1013(b) should be construed in a manner complementary to, rather than subversive of, the major premises of the Act. Under my brothers' reading, the tail now wags the dog." (555 F.2d at 15, A. 75.)

Even if the Fifth and Ninth Circuits read the legislative history too rigidly in limiting the boycott exception to conduct directed only at insurance companies and insurance agents, the broad construction adopted by the First Circuit would not be appropriate. It might not do violence to the legislative history to also apply the exception to coercive conduct of the sort described in *South-Eastern Underwriters* and the legislative debates where such conduct is used to compel traders in other industries to conform their competitive practices to the terms of a conspiracy.

The First Circuit, however, has gone substantially farther, and has interpreted the boycott exception in a way which cannot be supported by the boycott cases decided by this Court or by the history of the exception's language. Instead, the First Circuit has employed a novel definition of the term which would encompass virtually every "contract, combination . . . or conspiracy" covered by the Sherman Act, thus emasculating the McCarran-Ferguson antitrust exemption.

IV

The First Circuit's interpretation of the boycott exception is inconsistent with the overall purpose of the McCarran-Ferguson Act to leave the protection of policyholders to state regulation.

We have demonstrated that the language of the boycott exception and its history compel an interpretation which gives meaning and scope to the antitrust exemption, and that the "plain meaning" of the term boycott does not justify the anomalous result reached by the First Circuit.

The First Circuit's interpretation must also be rejected because it disregards this Court's direction that "[a]ll statutes must be construed in the light of their purpose." *Haggar Co.* v. *Helvering,* 308 U.S. 389, 394 (1940). Here, the First Circuit adopted a construction which subverts the main purpose of the McCarran-Ferguson Act.

The First Circuit mistakenly believed that its expansive reading of the boycott exception was justified by the "national purpose" of "preserving competition by means of the antitrust laws" and that "[t]o exclude consumers of insurance from the protection afforded by the boycott provision thus cuts against a basic policy of antitrust law." (555 F.2d at 9, A. 60-61.) The First Circuit lost sight of the fact that Congress enacted the McCarran-Ferguson Act precisely in order to withdraw the Sherman Act and other antitrust laws from the business of insurance, and to leave protection of insurance consumers to state regulation. By reading the boycott exception to reintroduce the full force of the Sherman Act to matters affecting the policyholder-

insurer relationship, the First Circuit sacrifices the policy of the McCarran-Ferguson Act to national antitrust policies which the McCarran-Ferguson Act was intended to render inapplicable to the business of insurance.

The background and objectives of the McCarran-Ferguson exemption were explained by this Court in *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 458-60 (1969):

> "The McCarran-Ferguson Act was passed in reaction to the Court's decision in *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944). Prior to that decision, it had been assumed, in the language of the leading case, that '[i]ssuing a policy of insurance is not a transaction of commerce.' *Paul* v. *Virginia*, 8 Wall. 168, 183 (1869). Consequently, regulation of insurance transactions was thought to rest exclusively with the States. In *South-Eastern Underwriters*, this court held that insurance transactions were subject to federal regulation under the Commerce Clause, and that the antitrust laws, in particular, were applicable to them. . . ."
>
> ". . . In context . . . it is relatively clear what problems Congress was dealing with. Under the regime of *Paul* v. *Virginia*, *supra*, States had a free hand in regulating the dealings between insurers and their policyholders. Their negotiations, and the contract which resulted, were not considered commerce and were, therefore, left to state regulation. The *South-Eastern Underwriters* decision threatened the continued supremacy of the States in this area. The McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation. . . ."
>
> ". . . Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which *Paul* v. *Virginia* held was not 'commerce'. The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.' "

There can be no question that the central purpose of the McCarran-Ferguson Act was to render federal law—and specifically the Sherman Act and other antitrust laws—inapplicable to matters affecting the insurer-insured relationship where those matters are regulated by state law. So strong was Congress' intent to remove the federal antitrust laws from this area, that Congress declared a three-year moratorium on the application of the antitrust laws to give the states time to enact regulatory legislation which would permanently preclude the application of the antitrust laws. 15 U.S.C. §1013(a).*

This intent is also reflected in the explanatory comments of Senator McCarran, co-author of the Act:

> "Mr. McCarran. During the moratorium . . . [r]egulatory acts must be enacted by the several States in each of the several States. Otherwise the antitrust acts become effective after January 1, 1948.
>
> Mr. Murdock. But is it not the purpose of the bill and does not the bill accomplish this—
>
> Mr. McCarran. It accomplishes a moratorium for 3 years against the operation of the acts mentioned, namely, the Sherman Antitrust Act, the Clayton Act, the Federal Trade Commission Act, as amended, and the Robinson-Patman Antidiscrimination Act.

* As originally enacted, the moratorium was to extend until January 1, 1948. 59 Stat. 34 (1945). In July 1947, the act was amended so as to give the states an additional six months in which to adopt preemptive regulation. 61 Stat. 448.

MR. MURDOCK. So that during the moratorium it is intended, is it not, that the States shall affirmatively step into the regulation of the insurance business?

MR. MCCARRAN. That is correct.

MR. MURDOCK. And it is intended that on the expiration of the moratorium the Sherman Act, the Clayton Act and the other acts mentioned will again become effective except—

MR. MCCARRAN. Except, as the States themselves have provided regulations." (91 Cong. Rec. 1442 (1945).)

On the heels of that exchange, Senator Pepper, an opponent of the Act, questioned whether Congress in fact intended to enact a continuing moratorium on the applicability of the antitrust laws to the business of insurance. Senator McCarran made the point even more forcefully.

"MR. PEPPER: Does that mean that after January 1, 1948, the States may determine whether or not the Sherman and the other acts become applicable to the business of insurance?

MR. MCCARRAN. The answer to that question is 'Yes.' During the 3-year moratorium the States may, if they see fit to do so, enact legislation for the purpose of regulation. If they do enact such legislation, *to the extent that they regulate they will have taken the business of insurance in the respective States out from under the Sherman Anti-trust Act,* the Clayton Act, and the other acts. If during the moratorium the States do not enact legislation for regulatory purposes, then on January 1, 1948, the Sherman Act, the Clayton Act, and the other acts will become immediately applicable.

. . . The pending bill is for the purpose of creating a moratorium for 3 years in order that the business of insurance shall not be interfered with by any Federal power under either the Clayton Act or the Sherman Act. So during the period of moratorium the various States themselves may take steps to regulate the business of insurance." (91 Cong. Rec. 1443 (1945).) (Emphasis supplied.)

The overriding intent of Congress admits of no doubt. As Congressman Gwynne emphasized, in reporting to the House on the work of the Conference Committee charged with fashioning the final version of the McCarran-Ferguson Act, the Act

> "starts out with the statement that insurance shall be subject to State control. . . . What we are trying to do is to make it clear to the States and to the insurance companies that we are as far as possible removing ourselves from the field." (91 Cong. Rec. 1090 (1945).)

The circumstances of this case demonstrate the sharp conflict between this Congressional purpose and the expansive interpretation of the boycott exception adopted by the First Circuit. Here, that interpretation would permit physicians to inject the federal courts into a controversy between policyholders and insurance companies concerning the terms of medical malpractice insurance coverage, even though Rhode Island has undertaken specific regulatory measures addressed to this issue.

In response to the McCarran-Ferguson Act, Rhode Island enacted an "Unfair Competition and Practices Law," the purpose of which, as stated in its preamble,

> "is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress) [The McCarran-Ferguson Act] by defining, or providing for the determination of—all

> such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." (R.I. Gen. Laws §27-29-1, A. 92.)

Certain unfair methods of competition and unfair or deceptive acts or practices are banned outright by Rhode Island law. (R.I. Gen. Laws §§27-29-3, 27-29-4, A. 92.) In addition, the State Insurance Commissioner may define other "unfair methods of competition" or "unfair or deceptive acts or practices" and investigate and proscribe such conduct. (R.I. Gen. Law §27-29-8, A. 103-05.)

Thus, to the extent that any medical malpractice insurance problems are attributable to anticompetitive conduct, Rhode Island has the power to deal with them. However, Rhode Island has shown that it regards the problems affecting medical malpractice insurance to be more complex, and to require more flexible remedies than an antitrust-type decree.

On June 16, 1975, twelve days after the service of plaintiffs' initial complaint in this action, and before service of the amended complaint, the Insurance Division of Rhode Island's Department of Business Regulation promulgated Emergency Regulation XXI (A. 114-27), creating the Joint Underwriting Association. The JUA, as stated in its declaration of findings and purposes, was designed to cope with problems arising from the "lack of [a] competitive stable market for medical malpractice insurance in the State of Rhode Island." (A. 116.) Its basic purpose, as set forth in the regulation, was "to provide for a temporary market to make the necessary medical malpractice insurance available" while allowing time "for the Governor's Commission on Medical Malpratice Reform to make its report, consideration of its recommendations and the enactment of any appropriate and necessary legislation." (*Id.*) Rhode Island has since made the JUA an ongoing agency of the State.*

The First Circuit would now interject a federal court into the study and resolution of the medical malpractice insurance problem through a class action antitrust suit seeking broad equitable relief regulating the conduct of all carriers selling malpractice insurance in Rhode Island. The result would be to establish the District Court as a parallel agency for the regulation of medical malpractice insurance in Rhode Island. This could hamper Rhode Island's freedom to resolve the problems addressed by the JUA and may impose federal antitrust policies which conflict with differing insurance regulatory goals.**

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* On January 12, 1976, Rhode Island enacted legislation specifically ratifying the JUA, R.I. Gen. Laws §42-14.1-1. (A. 106-12.) On April 9, 1976, Emergency Regulation XXI (A. 114-27) was superseded by current Regulation XXI (A. 141-60), making the JUA an ongoing agency.

** The potential for conflict is analogous to that recognized by this Court in *Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975). There, upholding a claim that regulation by the SEC immunized members of the stock exchange from "price fixing" allegations arising from self-imposed commission regulations, even without an express exemption, the Court said that:

> "[T]o deny antitrust immunity with respect to commission rates would be to subject the exchanges and their members to conflicting standards. . . . Such different standards are likely to result because the sole aim of antitrust legislation is to protect competition, whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry." (422 U.S. at 689.)

The same difference in perspective exists between federal antitrust policy and state insurance regulation, as was recognized by Senator Ferguson in debates preceding passage of the Act. (91 Cong. Rec. 1481, Col. 2 (1945).)

The potential for conflict in this case is evident from the face of the amended complaint. Plaintiffs seek injunctive relief which would require defendants to issue "occurrence" basis policies at reasonable rates and, perhaps, damages for the refusal to issue such policies in the interim. Yet the JUA, of which the defendant companies are members, is authorized to issue policies on either a "claims made" or "occurrence" basis as it deems appropriate.

Further, rates for medical malpractice insurance issued by the JUA or otherwise must be approved by the Insurance Department in accordance with standards of reasonableness provided by Rhode Island law. (R.I. Gen. Laws §§27-9-4, A. 86; 42-14.1-1(c), A. 107; Emergency Regulation XXI, §5, A. 120.) No other rate can be charged. Yet the relief which plaintiffs seek would substitute the judgment of the federal court for that of the State Insurance Department as to what constitutes a reasonable rate.

The same problem is raised by plaintiffs' demand for treble damages, apparently based on the alleged difference between what they claim would be a competitive rate and rates which either were approved by Rhode Island prior to creation of the JUA or have been established by the JUA since it began operations. To grant such relief would amount to a rebate from the rates established by Rhode Island. Notably, the First Circuit recognized this conflict in affirming the District Court's decision to abstain from deciding plaintiffs' state-law claims seeking restitution of allegedly excessive premiums. In so doing, the First Circuit stated that "recognizing a cause of action for the recovery of excessive past insurance premiums would profoundly affect the state's ratemaking machinery

and policies." (555 F.2d at 13, A. 69.) Precisely the same result will follow if the First Circuit's sweeping construction of the boycott exception is permitted to remain unaltered.

The First Circuit majority maintained that its reading of the boycott exception would not be inconsistent with the goals of the McCarran-Ferguson Act, but it implicitly recognized that under its reading the Act would no longer provide a meaningful shield against application of the Sherman Act to areas regulated by state law. Brushing aside the concerns of other courts that such an expansive reading of the exception would vitiate the policy of the McCarran-Ferguson Act to leave regulation of insurer-insured relations to the states, the First Circuit asserted that the doctrine of *Parker* v. *Brown,* 317 U.S. 341 (1943), is sufficient protection because it would still permit the states specifically to authorize conduct otherwise proscribed by the Sherman Act. (555 F.2d at 8, A. 60.) In thus recognizing that its expansive interpretation of the boycott exception would leave the business of insurance only with the uncertain umbrella of *Parker* v. *Brown,** the First Circuit rendered the McCarran-Ferguson exemption superfluous.

But Congress was not engaged in an academic exercise when it enacted the McCarran-Ferguson antitrust exemption. Congress was aware of *Parker* v. *Brown.* The Department of Justice, in fact, opposed passage of the McCarran-Ferguson antitrust exemption on the ground that

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* *See Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (1976); *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975); *Bates* v. *State Bar of Arizona,* 97 S.Ct. 2691 (1977), which suggest that it is far from clear that even state-sanctioned conduct would be exempt from the Sherman Act under *Parker* v. *Brown.*

Parker v. *Brown* afforded a sufficient exemption for protection of state regulation. Congress disagreed. In enacting the McCarran-Ferguson Act, Congress intended to afford the states a broader exemption and, as the legislative history shows, to withdraw the Sherman Act from the business of insurance where the states have enacted regulation in the field.

Justice Blackmun's concurring opinion in *Cantor* describes this history as follows:

> "The McCarran-Ferguson Act was passed in reaction to the holding in *United States* v. *Underwriters Assn.*, 322 U.S. 533 (1944), that the business of insurance is 'commerce' within the meaning of the Sherman Act. Congress' expressed concern was that the application of that Act would 'greatly impair or nullify the regulation of insurance by the States,' bringing to a halt their 'experimentation and investigation' in the area. The Act was vigorously endorsed by governors and insurance commissioners of 'almost all of the States.' The Justice Department, in opposing the McCarran-Ferguson Act, specifically argued that *Parker* v. *Brown,* 317 U.S. 341 (1943), made the legislation unnecessary because it immunized the insurance business insofar as it was regulated by the States. Congress was not so sure:
>
> " '*Parker* v. *Brown* dealt with a State commission authorized by State statute to enforce a program in conformity with, if not supplementary to, a Federal statute. Obviously, all State regulation concerning insurance does not and would not fall in such a category.' S. Rep. No. 1112, 78th Cong., 2d Sess., 2, 5-7 (1944). See also S. Rep. No. 20, 79th Cong., 1st Sess., 1-3 (1945); H.R. Rep. No. 873, 78th Cong., 1st Sess., 7 (1943); H.R. Rep. No. 143, 79th Cong., 1st Sess., 4 (1945)" (428 U.S. at 608 n. 4.)

Moreover, this Court has held that under the McCarran-Ferguson Act the state regulation which precludes the application of federal law is not limited to regulation specifically authorizing the conduct challenged. *FTC* v. *National Casualty Co.*, 357 U.S. 560 (1958). Hence, a construction of the boycott exception which would exempt the business of insurance from the Sherman Act only to the extent permitted by *Parker* v. *Brown,* or only where the conduct is specifically authorized by the state, is squarely inconsistent with both the history and this Court's interpretation of the McCarran-Ferguson Act.

In sum, the First Circuit's interpretation of the boycott exception nullifies the express Congressional purpose to withdraw the Sherman Act from the business of insurance where the states have enacted regulatory legislation. As Judge Campbell pointed out, it "introduces a new category of federal antitrust suit" which "could have unforeseeable effects upon state regulatory policies." (555 F.2d at 15, A. 75.) It would enable policyholders to convert grievances concerning the terms of their insurance policies into federal antitrust claims and, for the first time since the enactment of the McCarran-Ferguson exemption more than thirty years ago, it would thrust upon the federal courts a consumer protection role heretofore exercised exclusively by state insurance departments.

This radical change finds no support in the language or history of the Act. It should be rejected in favor of the more limited constructions which are necessary to give meaning to the McCarran-Ferguson antitrust exemption.

Conclusion

For these reasons, the First Circuit's judgment should be reversed and the antitrust allegations of the amended complaint should be dismissed.

Respectfully submitted,

SIDNEY S. ROSDEITCHER
HOWARD S. VEISZ
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10022

THOMAS D. GIDLEY
STEPHEN J. CARLOTTI
HINCKLEY, ALLEN,
SALISBURY & PARSONS
2200 Industrial Bank Building
Providence, Rhode Island 02903

Attorneys for The
Aetna Casualty and Surety Company

CHARLES LISTER
JONATHAN M. WEISGALL
COVINGTON & BURLING
888 16th Street, N. W.
Washington, D. C. 20006

JOSEPH A. KELLY
CARROLL, KELLY & MURPHY
326 Industrial Bank Building
Providence, Rhode Island 02903

Attorneys for
Hartford Casualty Company and
Hartford Fire Insurance Company

WALKER B. COMEGYS
POWERS & HALL
30 Federal Street
Boston, Massachusetts 02110

KIRK HANSON
HANSON, CURRAN & PARKS
1210 Turks Head Building
Providence, Rhode Island 02903

Attorneys for
St. Paul Fire & Marine
Insurance Company

JOSEPH V. CAVANAGH
HIGGINS, CAVANAGH & COONEY
600 Turks Head Building
Providence, Rhode Island 02903

Attorneys for
Travelers Insurance Company

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No. 77-240

ST. PAUL FIRE & MARINE INSURANCE COMPANY, *et al.*,
PETITIONERS,

v.

DAVID M. BARRY, M.D., *et al.*,
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR RESPONDENTS

LEONARD DECOF
LEONARD DECOF, LTD.
111 Wayland Avenue
Providence, Rhode Island 02906
Attorney for Respondents

Of counsel:
MARK S. MANDELL
MARTIN W. AISENBERG

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-240

ST. PAUL FIRE & MARINE INSURANCE COMPANY, *et al.*,
PETITIONERS,

v.

DAVID M. BARRY, M.D., *et al.*,
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR RESPONDENTS

The respondents respectfully request this Court to affirm the judgment of the United States Court of Appeals for the First Circuit entered in this case on May 16, 1977.

Opinions Below, Jurisdiction, Statutes Involved

The respondents concur in the statements under these headings in petitioners' brief.

Question Presented

Section 2(b) of the McCarran-Ferguson Act (hereinafter sometimes referred to as "the Act"), 15 U.S.C. §1012(b) (1970), provides, *inter alia,* that the Sherman Act, 15 U.S.C. §§1-7 (1970, *as amended,* Supp. V, 1975), is "applicable to the business of insurance [*only*] to the extent that such business is not regulated by State Law." However, §3(b) of the Act, 15 U.S.C. §1013(b) (1970) (hereinafter sometimes referred to as "the boycott exception"), provides that "[n]othing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." The question presented in this case is whether the protection provided by §3(b) is to be narrowly limited to competitors within the insurance industry or whether it extends to all victims of the proscribed practices, including policyholders.

Statement of the Case

The complaint alleges as follows: in April 1975, petitioners St. Paul, Aetna, Travelers and Hartford wrote all the medical malpractice insurance in the State of Rhode Island. (A. 20.) St. Paul was the largest carrier of medical malpractice insurance in the state, and most of its policies were written to expire on the same date. (A. 22.) Shortly before that date, in April 1975, St. Paul notified its insureds that it would not renew its policies on an occurrence basis but only on a claims made basis, which provides substantially reduced coverage. (A. 23-24.) When St. Paul's policyholders tried to take their business elsewhere, they found that the other insurers would not sell them any medical malpractice insurance on any terms. (A. 24-25.) This concerted refusal of three of petitioners to deal with

respondent physicians amounts to a boycott. (A. 25, 27.) In addition, petitioners are alleged to have engaged in a purposeful course of coercion and intimidation with respect to the sale of medical malpractice insurance. (A. 25, 27.)

Whether these allegations state a claim upon which relief can be granted depends upon whether §3(b), which prohibits boycott, coercion and intimidation, applies to policyholders. In resolving that issue, the First Circuit acknowledged the existence of several cases holding that, notwithstanding the apparent broad scope of the boycott exception, Congress intended that exception to apply only to insurance company boycotts of other insurance companies or agents. The court declined to follow those cases. It pointed out that the first of them, *Transnational Insurance Co.* v. *Rosenlund,* 261 F. Supp. 12 (D. Ore. 1966), "though referring broadly to 'the legislative history,' cited only a single page of the Congressional record in support of this reading." 555 F.2d at 7 (A. 56). It then noted that subsequent cases have simply adopted *Transnational's* interpretation of the legislative history, without any independent analysis of the issue, on the ground that any other reading of the boycott exception would "vitiate" or "emasculate" the McCarran-Ferguson antitrust exemption. *Id.* (A. 56-57.)[1]

The First Circuit based its rejection of prior authority on three grounds. First, the language of the statute is plain and unambiguous, and there is no need to resort to the legislative history to determine its scope. In support of this ground, the court stated that the words of the boycott exception,

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[1] *Transnational* and the other lower court cases relied upon by petitioners, as well as lower court precedents that support the opinion of the First Circuit, are fully discussed in respondents' Brief in Opposition to the Petition for a Writ of Certiorari at 7-15. That discussion will not be repeated in this brief.

> "within the context of the Sherman Act, do not appear to us as ambiguous. In antitrust law, a boycott is a 'concerted refusal to deal' wih a disfavored purchaser or seller. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Concerted refusal by a number of companies to sell malpractice insurance policies to doctors who were dissatisfied with the policy offered by their insurer would seem to fit within this definition of boycott. Indeed, appellees make no argument to the contrary. Nor do the cases attempt to justify their excursion into legislative history on the basis of ambiguity of language." 555 F.2d at 7-8 (A. 57-58) (footnote omitted).

Second, the First Circuit effectively refuted the unsupported assertions of some courts — repeated by petitioners and *amici* herein — to the effect that a narrow construction of the boycott provision is necessary to prevent "vitiation" or "emasculation" of the antitrust exemption. The court pointed out that, if the boycott exception were given its natural scope instead of an artificially narrow reading, McCarran-Ferguson would still (1) ensure the validity of state taxation and regulation of the business of insurance, and (2) insulate insurance companies both from antitrust liability for acts not amounting to boycott, coercion, or intimidation and from many other federal regulatory statutes. *Id.* at 8 (A. 58-59). The court also suggested that *Parker* v. *Brown*, 317 U.S. 341 (1943), would protect necessary state regulatory measures, noting that *Parker* "may have added strength in the insurance field because of the policies reflected in the McCarran-Ferguson Act." *Id.* at 8-9 (A. 60.) But, said the court,

> *"there is a large difference between allowing a state to fix insurance rates without fear of antitrust sanc-*

> *tions and similarly insulating companies which, outside any state-permitted structure or procedure, agree among themselves that customers dissatisfied with the coverage offered by one company shall not be sold any policies by any of the other companies.* Contrary to the argument of some of the appellees, giving normal scope to the boycott provision will not plunge federal courts into the enterprise of retroactive rate-making. Regulation by the state would be protected; concerted boycotts against groups of consumers not resting on state authority would have no immunity." *Id.* at 9 (A. 60) (emphasis added).

Finally, notwithstanding its belief that reference to the legislative history was unwarranted, the court entered into a detailed consideration of that history "in deference to the courts which have found support in [it]." *Id.* at 9 (A. 62). After an extensive discussion, including quotations of the congressional remarks relied upon most heavily by petitioners, the court concluded that the legislative debates and reports not only contain no evidence of a congressional intent to limit the boycott exception to acts or agreements directed against other insurance companies or agents, but actually support the view that the exception includes any boycott that is illegal under the Sherman Act:

> "[T]he boycott provision [was] the all purpose safety valve. It was amended twice, in each case to make it broader, first by making it effective across the entire Act and second by restoring the agreement language. Time after time the concern of skeptics and opponents were met by reference to this provision. We cannot imagine that they would have been at all satisfied if they had understood that 'boycott' was a code word confined to industry personnel. *See* Levi, *An*

Introduction to Legal Reasoning, 15 U. Chi. L. Rev. 501, 522 (1948). . . . While the vice of insurance company self-government outside the law obviously lay in their minds as a major evil to be combatted by the legislation, there is no suggestion that the legislation was limited to that evil. Indeed, Senator O'Mahoney referred to the Insurance Executives Association rules as 'the sort of agreement' to be condemned. *His summary answer to Senator Barkley that 'every effective combination or agreement to carry out a program against the public interest' would be prohibited by the boycott section could not be more unrestricted." Id.* at 11-12 (A. 67-68) (emphasis added).

Summary of Argument

The statutory language is clear and unambiguous and does not require interpretation. Section 3(b) expressly applies the Sherman Act to "any" act or agreement of boycott, coercion, or intimidation. Since a concerted refusal to deal with consumers is a boycott, respondents have alleged a boycott within the meaning of §3(b). Petitioners' argument that consumers cannot be boycotted is inconsistent with case law and with the well-established consumer protection function of the Sherman Act. Furthermore, respondents' allegations of coercion and intimidation, which petitioners have never challenged, are alone sufficient to require denial of petitioners' motion to dismiss.

The legislative history of the McCarran-Ferguson Act supports the view that §3(b) includes all acts of boycott, coercion, or intimidation that are illegal under the Sherman Act. The congressional debates show that the purpose of the Act was to uphold the validity of state taxation and regulation of insurance, not to immunize insurance companies from antitrust liability for private anticompetitive

agreements not authorized by the states. The purpose of §3(b) was to deprive insurance companies of the enforcement mechanisms needed to carry out private anticompetitive conspiracies. The debates do not support the view that the protection of §3(b) is limited to a particular class of victims.

Moreover, this Court has consistently given a narrow construction to the exemption from federal regulation contained in §2(b) of the Act, thus giving correspondingly broad scope to federal concerns. A narrow reading of §3(b) would be inconsistent with these decisions.

The First Circuit's interpretation of §3(b) will not interfere with state regulation and taxation of insurance, nor will it subject insurance companies to antitrust liability for legitimate, state-authorized concerted activities. It is consistent with the nation's antitrust policies and with the overall purpose of the McCarran-Ferguson Act. The petitioners have not shown any reason why they should be given an implied exemption from liability under §3(b). Accordingly, the decision of the First Circuit should be affirmed.

Argument

I. The First Circuit Correctly Interpreted Section 3(b) in Accordance With Its Plain Meaning.

The issue in this case is whether the concerted refusal of three insurance companies to sell medical malpractice insurance to a group of physicians constitutes a "boycott" within the meaning of the boycott exception. The question is thus one of statutory construction, and the starting point in every case involving the construction of a statute is in the plain meaning of the statutory language itself. *See Blue Chip Stamps* v. *Manor Drug Stores*, 421

U.S. 723, 756 (1975) (Powell, J., concurring); *Flora* v. *United States*, 357 U.S. 63, 65 (1958); *United States* v. *Great Northern R.R.*, 343 U.S. 562, 575 (1952). The respondents submit that the plain meaning of the term "boycott" encompasses the conduct alleged here and that the statutory language contains no hint of the artificial limitations that petitioners seek to impose.

A. *Consumers can be the victims of a boycott.*

Although they did not brief or argue this issue in the court below, *see* 555 F.2d at 7-8 (A. 57-58),[2] petitioners now ask this Court to hold that a concerted refusal to deal with consumers is not a boycott. (Pet. Br. at 21-24.) No such statement is to be found, however, in any of the cases cited by petitioners in support of their argument. This Court has never stated, nor even suggested, that consumers cannot be the victims of a boycott.

In fact, the term "boycott" is commonly understood to include any concerted refusal to deal. *See, e.g., Transnational Insurance Co.* v. *Rosenlund*, 261 F. Supp. 12, 28 (D. Ore. 1966); *Johnson* v. *Joseph Schlitz Brewing Co.*, 33 F. Supp. 176, 181 (E.D. Tenn. 1940), *aff'd mem.*, 123 F.2d 1016 (6th Cir. 1941). A boycott is not merely one type of concerted refusal to deal; rather, the terms are synonymous. Bird, *Sherman Act Limitations on Noncommercial Refusals to Deal*, 1970 Duke L.J. 247, 248 n.2. As one author puts it:

> "The legality . . . of a form of group economic action called a 'boycott' or, less invidiously, a 'concerted refusal to deal' has frequently been tested in the courts.

[2] See also respondents' Brief in Opposition to the Petition for a Writ of Certiorari at 20-21.

> *In its simplest aspects, a boycott or concerted refusal to deal is nothing more than an agreement among a number of economic actors to sever or limit economic relations with another economic actor or actors." Id.* at 248 (footnotes omitted) (emphasis added).

Thus, the term "boycott" is actually "a very broad label for divergent types of concerted activity," *Worthen Bank & Trust Co.* v. *National BankAmericard Inc.*, 458 F.2d 119, 125 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974) — including concerted refusals to deal with consumers.[3]

The Ninth Circuit has squarely held that the concerted refusal of manufacturers or dealers to deal with consumers is a boycott under the antitrust laws. *Washington State Bowling Proprietors Association* v. *Pacific Lanes, Inc.*, 356 F.2d 371, 376 (9th Cir.), *cert. denied*, 384 U.S. 963 (1966). Furthermore, this Court has clearly indicated that consumers can be boycotted. In *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533 (1944) — the case from which Congress drew the "boycott, coercion, or intimidation" language of McCarran-Ferguson — the Court described the charges set forth in the indictment as follows:

[3] "Some commentators would artificially restrict the meaning of 'boycott', apparently fearing an overbroad application of the rule that boycotts are illegal *per se*. *See* L. Sullivan, *Antitrust* §§ 83, 90 (1977). This fear may be allayed more directly by recognizing that, while some boycotts are irredeemably anti-competitive and thus fit subjects for a *per se* rule, others are benign and not properly treated as illegal *per se*. *See* P. Areeda, *Antitrust Analysis* 287 (1967); *see also Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969) (boycott not illegal *per se* when participants had no anti-competitive motive). Certainly nothing in this opinion requires the application of a *per se* rule to all acts falling within the ordinary meaning of the word 'boycott.' " 555 F.2d at 8 n.4 (A. 58 n.4).
This issue is discussed in greater detail in Point V, *infra*.

> "The conspirators not only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force nonmember insurance companies into the conspiracies, *and to compel persons who needed insurance to buy only from S.E.U.A. members on S.E.U.A. terms* . . . . [P]*ersons needing insurance who purchased from non-S.E.U.A. companies were threatened with boycotts and withdrawal of all patronage.*" *Id.* at 535-36 (emphasis added).

Moreover, the concluding paragraph of the opinion referred to "combinations of insurance companies to coerce, intimidate, and boycott competitors *and consumers.*" *Id.* at 562 (emphasis added). Thus, the *South-Eastern Underwriters* Court was clearly of the opinion that consumers in general, and consumers of insurance in particular, could be the victims of a boycott.[4]

[4] *See also FMC* v. *Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238, 250 (1968) (concerted refusal to deal with steamship passengers; Court branded as illegal "any agreement by a group of competitors to boycott a particular buyer or group of buyers"); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.,* 364 U.S. 656 (1961) (per curiam) (defendants' alleged agreement not to sell gas to consumers for use in gas heaters manufactured by plaintiff would, if proved, constitute a *per se* violation of the Sherman Act); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219, 236 (1948) ("[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers").

If, as the First Circuit suggested, 555 F.2d at 7-8 n.4 (A. 57-58 n.4), boycotts of consumers are less common than boycotts of businessmen, that is obviously because a successful boycott requires a captive market—that is, the victims of the boycott must be in a position where they have no choice but to do business with the boycotters and therefore must submit to the conspirators' demands. Otherwise, the victims will simply take their business elsewhere, and the boycott will fail. Thus, where the consuming public is large and its market choices numerous, it cannot be trapped by a boycott. In this case, however, respondents allege that petitioners have complete control over the medical malpractice insurance market in Rhode Island. (A. 20.)

Furthermore, the purpose of the boycott of consumers in *South-Eastern Underwriters* — "to compel persons who needed insurance to buy only from S.E.U.A. members on S.E.U.A. terms," *id.* at 535 — is precisely analogous to the purpose of the boycott alleged in this case—to compel physicians then insured by petitioner St. Paul to continue to buy malpractice insurance only from St. Paul, and on St. Paul's terms. Physicians cannot practice without malpractice insurance; and if only one insurer will sell it to them, then they must perforce buy from that one at whatever terms the seller chooses to dictate. Thus, the boycotts of policyholders in *South-Eastern Underwriters* and in this case both fall into the category of boycotts "directed at controlling the terms and manner of distribution of the subject article." *United States* v. *General Electric Co.,* 80 F. Supp. 989, 1009 (S.D.N.Y. 1948).

The petitioners, however, argue that a concerted refusal to deal is not a boycott unless it has as its purpose the elimination of a competitor from the market or the control of the victim's trading practices. (Pet. Br. at 21, 23.) No other purpose will suffice to make a boycott, according to petitioners. In fact, boycotts have many purposes. The objective of a conspiracy is irrelevant to whether that conspiracy is a boycott. *See* Note, *Concerted Refusals to Deal Under the Federal Antitrust Laws,* 71 Harv. L. Rev. 1531, 1531-32 (1958); *cf. Fashion Originators' Guild of America, Inc.* v. *FTC,* 312 U.S. 457, 467-68 (1941). For example, in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,* 340 U.S. 211 (1951), the defendant distillers, in an unusual twist on resale price maintenance, conspired to refuse to sell to wholesalers who would not agree to *maximum* resale prices set by the defendants. The Court held, *id.* at 214, that "the Sherman Act makes it an offense for respondents to agree among themselves to stop selling to particular customers" — regardless of the reason. *See also United*

States v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 295 (1945) (conspiracy to raise, fix and stabilize retail liquor prices enforced by a two-way vertical boycott).

The petitioners also contend that this is not a boycott because it is "[n]othing more . . . than a conspiracy among insurance companies to voluntarily limit competition among themselves." (Pet. Br. at 23-24.) The emphasis on voluntariness is puzzling; every boycott is a voluntary agreement among the conspirators. Voluntary anticompetitive agreements are not immune from antitrust liability; indeed, "[i]t is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to antitrust policy." *UMW* v. *Pennington*, 381 U.S. 657, 668 (1965).

More fundamentally, however, this argument again relies upon the erroneous notion that the purpose of a boycott is part of its definition. A boycott is an enforcement mechanism for carrying out an anticompetitive decision, not an end in itself. *See United States* v. *Frankfort Distilleries, Inc., supra*, 324 U.S. at 295; *Proctor* v. *State Farm Mutual Automobile Insurance Co.*, 561 F.2d 262, 274 (D.C. Cir.), *petition for cert. filed*, No. 77-580, 46 U.S.L.W. 3294 (U.S. Oct. 19, 1977); Pet. Br. at 25. No matter what kind of anticompetitive agreement a boycott is used to enforce, it is still a boycott. In any event, there is nothing novel about the use of a boycott to enforce a horizontal agreement not to compete. *See Johnson* v. *Joseph Schlitz Brewing Co., supra.*

The artificiality of petitioners' attempt to divide victims of concerted refusals to deal into "traders" and "consumers" is shown by the fact that the victims in the *Kiefer-Stewart* and *Frankfort Distilleries* cases, both *supra*, though traders, were also customers; and respondent physicians in this case, though customers, purchase malpractice insurance for commercial purposes. There is no sharp con-

ceptual difference between the liquor wholesalers and retailers in *Kiefer-Stewart* and *Frankfort Distilleries*, who had to purchase the defendants' product in order to carry on their business, and respondent physicians here, who must purchase petitioners' product in order to carry on their business. The anticompetitive effect of the boycott is directed against "traders" in both cases.

Even if respondent physicians are considered simply as ultimate consumers (like purchasers of homeowners' insurance), however, petitioners' notion that concerted refusal to deal with consumers is not a boycott flies in the face of the whole policy of the antitrust laws. As the First Circuit noted,

> "the features that make boycotts objectionable do not disappear when consumers are boycotted. Like boycotts aimed at retailers, concerted refusals to deal with consumers may restrain traders' 'ability to sell in accordance with their own judgment'; they can deprive consumers of the 'freedom to buy . . . in an open competitive market'; and they 'interfere with the natural flow of interstate commerce.' *See Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, [359 U.S. 207, 212-13 (1959)]." 555 F.2d at 8 n.4 (A. 58 n.4).

This Court has recently held that a foreign government is a "person" within the meaning of § 4 of the Clayton Act. *Pfizer, Inc.* v. *Government of India*, 46 U.S.L.W. 4073 (U.S. Jan. 11, 1978). The Court noted the broad scope of the antitrust laws, stating that " '[t]he Act is comprehensive in its terms and coverage, *protecting all who are made victims of the forbidden practices* by whomever they may be perpetrated.' " *Id.* at 4074, *quoting Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (emphasis added). In light of the historic sweep of the antitrust laws, it would be extraordinary if the antitrust term "boycott" were to be held to be a narrow,

technical, exclusionary term. Under petitioners' interpretation, consumers who are victimized by concerted refusals to deal would be left remediless under the Sherman Act, merely because they are consumers; and this would be so not only in cases involving insurance, but in all cases. Such a result is inconsistent with the history and purpose of the Sherman Act. *See Pfizer, Inc.* v. *Government of India*, *supra*, 46 U.S.L.W. at 4076.

In fact, consumer protection is one of the historic functions of the Sherman Act. The Court in the *Pfizer* case unanimously agreed that the purposes of the antitrust laws is to protect American consumers. *See* 46 U.S.L.W. at 4074-75 (opinion of the Court); *id.* at 4076 (Burger, C.J., dissenting). The protection of businessmen from conspiracies in restraint of trade is not, or is not solely, an end in itself; its purpose is to protect the general public from the evils that flow from monopoly and to secure to it the benefits of competition. *Paramount Famous Lasky Corp.* v. *United States*, 282 U.S. 30, 42-43 (1930); Woolley, *Is a Boycott a Per Se Violation of the Antitrust Laws?*, 27 Rutgers L. Rev. 773, 790 (1974). Free competition benefits the consumer as well as the seller. As the Court said in *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940):

> "The end sought [by the passage of the Sherman Act] was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market *to the detriment of purchasers or consumers of goods and services*, all of which had come to be regarded as a special form of *public* injury." *Id.* at 493 (emphasis added) (footnote omitted).

The ultimate victim of a boycott is always the consumer. Yet petitioners propose that the Sherman Act be interpreted so that businesses can accomplish directly, through

boycotts of consumers, what they are not permitted to accomplish indirectly through boycotts of other traders. Their proposal has the anomalous result of permitting the direct harmful act against the consumer while prohibiting the act that indirectly results in harm to the consumer. The consumer is a chief beneficiary of the Sherman Act; it would be absurd to strip him of that protection when the coercive activity is directed at him.

In view of the broad consensus that the term "boycott" encompasses a wide range of activities, the clear indication in *South-Eastern Underwriters* and other cases that concerted refusal to deal with consumers is a boycott, and the historic purpose of the Sherman Act to secure the benefits of free competition to consumers, this Court should reject petitioners' narrow, technical definition. The respondents submit that the plain meaning of the term "boycott" is simply a concerted refusal to deal—with any person and for any purpose. That includes the conduct alleged here.

B. *Even without the boycott allegation, respondents are afforded the protection of section 3(b) against coercion or intimidation.*

The petitioners' argument ignores the fact that the complaint alleges acts of coercion and intimidation as well as boycott. (A. 25, 27). The petitioners have never challenged the sufficiency of those allegations. Nor do they claim that "coercion" and "intimidation" are terms of art that can only be used to describe acts perpetrated against businessmen. There is no question but that consumers can be the victims of coercion and intimidation.[5]

[5] The obviously broad and nontechnical meaning of the words "coercion" and "intimidation" supports the view that the term "boycott" is also used in its ordinary sense as any concerted refusal to deal. Congress clearly did not have a narrow category of conduct in mind when it enacted § 3(b).

Section 3(b) is written in the disjunctive. It is not necessary to allege boycott, coercion *and* intimidation; the allegation of any one of those acts is sufficient to bring the case within the exception Moreover, the legislative history of the McCarran-Ferguson Act makes it quite clear that "coercion" and "intimidation" have meaning independent from "boycott." In discussing the scope of § 3(b), Senator Ferguson, co-author and Senate floor manager of the bill, stated:

> "[I]f agreements in restraint of trade or to monopolize amounted either to a boycott *and/or* coercion *and/or intimidation,* they would be absolutely void . . . ." 91 Cong. Rec. 480 (1945) (emphasis added).

In addition, he pointed out (*id.* at 1481):

> "[T]here are *six* things on which a State could not legislate. They are boycott, coercion, or intimidation, or agreements to boycott, coerce or intimidate." (emphasis added).

The allegations of coercion and intimidation are not redundant; they refer to acts other than the boycott itself. *See United States* v. *South-Eastern Underwriters Association, supra,* 322 U.S. at 535 (distinguishing between boycotts and other types of coercion and intimidation). The sufficiency of these allegations to state a claim under § 3(b) stands unchallenged. The respondents are clearly entitled to protection against the alleged acts. Accordingly, the First Circuit's denial of petitioners' motion to dismiss should be affirmed, regardless of the definition of "boycott."

C. *The statutory language expressly includes all agreements and acts of boycott, coercion, or intimidation.*

Section 3(b) provides that the Sherman Act shall remain applicable to "*any* agreement to boycott, coerce,

or intimidate, or act of boycott, coercion, or intimidation." (emphasis added.) There is not the slightest suggestion of any limitation upon the scope of these words. By the express terms of the Act, all agreements and acts of boycott, coercion, or intimidation are covered.

These words are clear and unambiguous and require no interpretation. 555 F.2d at 7-8 (A. 57-58). The statute plainly prohibits *all* agreements and acts of boycott, coercion, or intimidation—including agreements and acts directed against policyholders. Thus, as the First Circuit said, "the artificial reading of the boycott provision that [respondents] urge . . . can only be characterized as a judge-made expansion of the Act." 555 F.2d at 9 (A. 61). There is no justification for going behind the statutory language to obtain this strained construction.

In short, there is no reason to reject the literal interpretation of the statutory words, unless that interpretation would lead to absurd results or would thwart the obvious purpose of the Act. *Helvering* v. *Hammell,* 311 U.S. 504, 510-11 (1941). The petitioners, of course, argue that such is the case here. As we show in Point II, however, the only proper reading of § 3(b), consistent with the overall purpose of the Act, is that of the First Circuit.

II. The First Circuit's Interpretation of Section 3(b) Is Fully Consistent With, and in Fact Supports and Carries Out, the Purpose of the McCarran-Ferguson Act.

A. *The purpose of the Act was to protect state taxing and regulatory programs, not to immunize insurance companies from antitrust liability.*

In *United States* v. *South-Eastern Underwriters Association, supra,* this Court held for the first time that the business of insurance is interstate commerce and therefore is

subject to federal regulation. While the *South-Eastern* case was pending in this Court, legislation was introduced in Congress that would have exempted the business of insurance from all federal regulation, including the antitrust laws. That legislation was defeated. 91 Cong. Rec. 1477, col. 3 (1945) (remarks of Senator Pepper); *id.* at 1487, col. 3 (remarks of Senator Barkley); Note, *Applications of Federal Antitrust Laws to the Insurance Industry*, 46 Minn. L. Rev. 1088, 1090 n.11 (1962) (hereinafter cited as "Minnesota Note"). When Congress passed the McCarran-Ferguson Act the following year, it did not grant the insurance industry a blanket exemption from the Sherman Act; rather, it provided that, even where the business of insurance is fully regulated by the states, the Sherman Act remains applicable to "any" agreement or act of boycott, coercion, or intimidation.

The petitioners assume the very point at issue when they assert that "[t]here is no question" that the purpose of the McCarran-Ferguson Act was "to render the Sherman Act inapplicable to the business of insurance *except in limited circumstances.*" (Pet. Br. at 14 [emphasis added].) We agree with petitioners that the terms "boycott, coercion, or intimidation" do not encompass every conceivable violation of the Sherman Act. *See* 555 F.2d at 8 (A. 59). But whether, within that limitation, § 3(b) is to be given its natural scope or an artificially narrow construction is precisely what the Court must decide in this case. It is a question of determining the balance between the § 2(b) antitrust exemption on the one hand and the boycott exception on the other.

This Court has held that the purpose of McCarran-Ferguson "was to allay doubts, thought to have been raised by this Court's decision [in *South-Eastern Underwriters*], as to the continuing power of the States to tax and regulate the business of insurance." *FTC* v. *Travelers Health Association*, 362 U.S. 293, 299 (1960) (footnote omitted). Its

primary purpose, in other words, was "to *permit* the continued exercise of state power rather than to *prevent* the exercise of federal power." Minnesota Note, 46 Minn. L. Rev. at 1092-93 (footnote omitted).

The kind of state regulation that Congress particularly wished to uphold was regulation that authorized or permitted the fixing of rates and terms through the use of rating bureaus or other joint mechanisms. Such activity would obviously be violative of the Sherman Act in the absence of the McCarran-Ferguson Act. Just as obviously, such activity has nothing to do with boycott, coercion, or intimidation, which are still forbidden under McCarran-Ferguson.

The language of McCarran-Ferguson clearly speaks in terms of protecting state regulatory programs, not insurance companies. Section 1 declares that continued state regulation and taxation of insurance is in the public interest and that congressional silence shall not be construed to prevent such regulation and taxation. Section 2(a) provides that the business of insurance shall be subject to state taxing and regulatory programs. The first clause of § 2(b) provides that only federal statutes that specifically relate to insurance shall supersede state insurance regulations.

In furtherance of this purpose of validating state regulatory programs without relinquishing paramount federal control, § 2(b) goes on to provide that the Sherman Act, the Clayton Act, and the Federal Trade Commission Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." And to assure federal control over an important range of anticompetitive activities, § 3(b) provides that the Sherman Act remains applicable to all agreements or acts of boycott, coercion, or intimidation.

Under the statutory scheme, only two kinds of federal laws apply to the business of insurance *notwithstanding state regulation:* (1) laws expressly relating to insurance;

and (2) the Sherman Act, to the extent that it prohibits boycott, coercion and intimidation. Thus, the Sherman Act's prohibition of such acts and agreements is placed on the same high plane as federal legislation expressly addressed to the business of insurance. In determining the scope of § 3(b), its importance in the statutory scheme must be kept in mind.

The obvious purpose of § 3(b) was to ensure that the core safeguards of the Sherman Act would be maintained. Congress clearly felt that the states could not effectively control insurance company conspiracies involving boycott, coercion, or intimidation and that the public interest required federal protection against such practices under the Sherman Act. Note, *The Limits of State Regulation Under the McCarran-Ferguson Act,* 42 Geo. Wash. L. Rev. 427, 445 (1974); Minnesota Note, 46 Minn. L. Rev. at 1103-04.

Thus, the respective purposes of the McCarran-Ferguson antitrust exemption, on the one hand, and the boycott exception, on the other, do not support the artificially narrow reading of the latter proposed by petitioners.

The foregoing argument is supported by the legislative history of the Act, to which we now turn. Three threads run consistently through the congressional debate: First, the primary purpose of the legislation was to ensure the validity of state taxation of the business of insurance, which was thought to be in immediate jeopardy because of the *South-Eastern Underwriters* decision. Second, Congress only proposed to permit price-fixing and other activities that would otherwise violate the antitrust laws to the extent that such activities were authorized by the states; it gave no sanction to private anticompetitive agreements, and it sought by means of § 3(b) to rob such agreements of their effectiveness. Third, the terms "boycott, coercion, or intimidation" have their full Sherman Act scope—that is, that they include all acts or agreements of boycott, coercion or intimidation, against whomever such acts or agreements may be directed.

B. *The legislative history of the boycott exception shows that it was intended to apply to all boycotts.*[6]

The bill that ultimately became the McCarran-Ferguson Act was reported out of committee to the Senate on January 24, 1945 and to the House on February 13, 1945. Both committee reports cited the boycott provision. The Senate report noted that "at no time are the prohibitions of the Sherman Act against *any* agreement or act of boycott, coercion, or intimidation, suspended. These provisions of the Sherman Act remain in full force and effect." S. Rep. No. 20, 79th Cong., 1st Sess. (1945) (emphasis added). The House report was the same except for the exclusion of the words "agreement or," since the "agreement" language had been deleted from the bill by the House committee. H.R. Rep. No. 143, 79th Cong., 1st Sess. (1945).

The bill was debated in the Senate on January 25. At the outset, Senator Ferguson, co-author and Senate floor manager of the bill, sounded a main theme of the debate —that speedy action was necessary so that the states could collect insurance company taxes then coming due:

> "Mr. President, in order to show the importance of this matter to the States, let me say that this morning I received word that Commissioner Charles F. J. Harrington, of Massachusetts, who is chairman of the committee on Federal legislation of the insurance commissioners body, was advised by William P. J. Hodges, insurance commissioner for the State of North Carolina, that some insurance companies had given notice to their States that they would not pay the tax which is being levied in those States, or that they would pay

[6] The complete 1945 legislative history of the McCarran-Ferguson Act, including all the congressional debates, is reproduced in the Addendum to Brief for Appellees St. Paul Fire & Marine Insurance Co. and Travelers Insurance Co., filed in the First Circuit.

it under protest. Under the law, it would be necessary to suspend the licenses of such companies and of all their agents. The insurance tax would have to be paid by February 15. In South Carolina, Kentucky, and Tennessee the tax is due on February 1.

"So it is advisable that the bill be passed quickly, if it is possible to do so." 91 Cong. Rec. 478-79 (1945).

Accord, id. at 483, col. 1 (remarks of Senator Radcliffe); *id.* at 484, col. 1 (remarks of Senator Ferguson); *id.* at 485, col. 3 (remarks of Senator Revercomb); *id.* at 487, col. 1 (remarks of Senator Ellender).

Senator Ferguson also made two important comments on § 3(b), in response to Senator O'Mahoney's concern that the bill would permit the states to authorize insurance company monopolies:

"Mr. O'MAHONEY. . . . Does the Senator from Michigan [Ferguson] conceive that the pending bill as reported by the Judiciary Committee . . . has the effect of making it possible for a State to legalize contracts in restraint of trade or has the effect of making it possible for any State to authorize attempts on the part of any group of insurance companies to monopolize the business of insurance. I did not understand that to be the opinion of the Senator from Michigan.

"Mr. FERGUSON. No. I will answer that by saying that *if agreements in restraint of trade or to monopolize amounted either to a boycott and/or coercion and/or intimidation, they would be absolutely void,* because they would contradict the bill which is now being considered by the Senate and which it is hoped will be passed today." Id. at 480 (emphasis added).

This exchange shows that if *any* agreement in restraint of trade is carried out by means of boycott, coercion, or intimidation, the conspirators are subject to Sherman Act liability. There is no limitation on either the nature of the agreement or its victims.

Senator O'Mahoney continued to express the fear that the bill would permit the establishment of monopolies in the field of insurance. Senator Ferguson responded as follows:

"[I]t is not the purpose of the bill at all to foster monopoly, or to anticipate that any act will be passed permitting or even encouraging monopoly. *A State law relating to taxation, a law relating to regulation,* for instance, the fixing of rates, or the fixing of the terms of a contract of insurance, which might under some definitions of monopoly be monopolistic, would be permitted under the pending bill; *but if the State law undertook to authorize a boycott, a coercion, or an intimidation, or an agreement to do any of those three things, then it would be clearly void* because Congress would have already spoken, and once Congress speaks on interstate commerce, no State can speak contrary to the congressional declaration." *Id.* at 480-81 (emphasis added).

This clearly shows that the purpose of the Act was to protect state regulatory programs, not insurance companies. It shows that the particular concern of Congress was the validation of state taxation and of state regulation of the cost and terms of insurance. And it shows that, although specific insurance company activities permitted by the states might be monopolistic, the bill was not intended to permit monopolization as such. Section 3(b) was Congress' tool to prevent monopolization and agreements in restraint of trade—"the all purpose safety valve," as the court below said in this case. 555 F.2d at 11-12 (A. 67). The chief protection against monopolization of the insurance industry

was not to be state regulation; it was to be federal regulation under the Sherman Act, through the boycott exception.

Nowhere in these exchanges did Senator Ferguson, or any other senator, suggest that Congress was only concerned with boycott, coercion, or intimidation against particular targets; nowhere did they suggest that the states had any role with respect to any kind of boycott, coercion, or intimidation. To the contrary, Senator Ferguson expressly stated that such acts or agreements were beyond the power of the states to permit.

The bill was briefly debated in the House on February 9 and 12 and more extensively on February 14. Once again, there were many references to the urgency of passing a bill so that the states could continue to tax the insurance companies. 91 Cong. Rec. 979, col. 2-3 (1945) (remarks of Representative Anderson); *id.* at 1087, col. 1-2 (remarks of Representative Hancock); *id.* at 1090-91 (colloquy between Representatives Gwynne and Crawford).

The chief subject of debate was the fact that the House version of the boycott exception only prohibited *acts* of boycott, coercion, or intimidation, not *agreements*. Representative Celler argued that the word "agreements" was necessary to prevent insurance company blacklists of other insurance companies or agents. *Id.* at 1087, col. 3. Representative Walter, the floor manager of the bill, stated that he would not object to amending the bill in conference to include agreements as well as acts of boycott, coercion, or intimidation. *Id.* at 1088, col. 2-3 (colloquy between Representatives McCormack and Walter).

Since the "agreement" language was added to prevent insurance company blacklists, the preexisting "acts" language obviously must have been directed at conduct other than blacklisting. The prohibition against blacklisting was thus an added prohibition, not the original and exclusive target of §3(b), as petitioners would have this Court hold.

No congressman responded to Representative Celler's argument by saying that, since §3(b) was only intended to deal with blacklists in the first place, no amendment was necessary.

Nevertheless, Representative Celler's speech has been cited by a number of courts in support of the narrow view of the boycott exception urged by petitioners. *E.g., Transnational Insurance Co.* v. *Rosenlund, supra,* 261 F. Supp. at 26-27 & n.1. Mr. Celler has taken emphatic issue with this use of his remarks, however, in a letter inserted in the Congressional Record by Representative Corman:[7]

> "By no stretch of the imagination can my remarks be construed as intended to limit the applicability of the Sherman Act to antitrust acts among insurance companies and agents. . . . To the contrary, I think it crystal clear, both from my own remarks and from the legislative history of the McCarran-Ferguson Act, that §1013(b) was intended to render the Sherman Act applicable to (i) *all* agreements to boycott, coerce or intimidate and (ii) to *all* acts of boycott, coercion or intimidation." 120 Cong. Rec. 37351 (1974).

The bill went to conference. An important change was made in conference: the addition of the permanent antitrust exemption contained in §2(b). The original bill had contained only a 3-year moratorium. The House agreed to the conference report without debate. 91 Cong. Rec. 1396 (1945). In the Senate, however, the antitrust exemption sparked an extensive debate.

That debate was held on February 27. The most vocal opponent of the bill in this debate was Senator Pepper. He objected to the provision of §2(b) that would allow the

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[7] The letter is reproduced in full in Appendix B to respondents' Brief in Opposition to the Petition for a Writ of Certiorari.

states to authorize insurance company activities that would otherwise violate the antitrust laws. Senator Ferguson responded to Senator Pepper's concerns by referring to the boycott exception:

> "Under the language which is now in the bill as it appears in the conference report, if a State passes an act regulating insurance or taxing insurance, and that regulation is contrary to the Sherman Act or the Clayton Act, with three exceptions, then the State law would be the law. Here are the exceptions:
>
> "'Nothing contained in this act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.'
>
> "*In other words, under the terms of the bill, there are six things on which a State could not legislate. They are boycott, coercion, or intimidation, or agreements to boycott, coerce, or intimidate.* But with respect to anything else, if the States were specifically to legislate upon a particular point, and that legislation were contrary to the Sherman Act, the Clayton Act, or the Federal Trade Commission Act, then the State law would be binding. That is exactly what we attempted to do in the bill. It is clear what we intended to do. *After a conference with the House, we believed that the States should regulate insurance, and taxation on the insurance business. But we spelled out certain things on which we thought Congress should not allow the States to legislate. Those are the things which I have mentioned.* As to the others, the State has full power to act by legislation — not by agreement but by legislative act." 91 Cong. Rec. 1481 (1945) (emphasis added).

It is important to note Senator Ferguson's repetition of the principle that the states cannot legislate with respect to boycott, coercion, or intimidation. If the alleged acts of petitioners in this case do not amount to boycott, coercion, or intimidation within the meaning of §3(b), then it necessarily follows that the states have the power to authorize such acts. The states, in petitioners' view, could authorize insurance companies to divide up the markets for particular types of insurance and to refuse to deal with each other's customers, so that each insurer's policyholders would be a captive market to which the insurer could dictate terms with respect to all types of insurance. Indeed, under petitioners' interpretation, the states could authorize insurance companies to boycott, coerce and intimidate everyone except other insurance companies and agents. *Cf. Battle* v. *Liberty National Life Insurance Co.*, 493 F.2d 39, 51 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975) (physical violence by insurance company against other traders). It is inconceivable that Congress intended such a result. The whole thrust of the congressional debates is that such predatory practices remain subject to Sherman Act control and beyond the competence of the states.

Senator Ferguson then pointed out that the purpose of the bill was to permit the states to authorize certain concerted activities, such as rate-fixing, but not to permit such activities on a wholly private basis without state authority:

> "This bill would permit — and I think it is fair to say that it is intended to permit — rating bureaus, because in the last session we passed a bill for the District of Columbia allowing rating. *What we saw as wrong was the fixing of rates without statutory authority in the States; but we believe that State rights should permit a State to say that it believes in a rating bureau.*" 91 Cong. Rec. 1481 (1945) (emphasis added).

Thus, petitioners' suggestion that no conspiracy involving price-fixing could fall within §3(b) is clearly wrong. The purpose of the Act was to permit state-authorized rate-fixing, not to give the insurance companies carte blanche to engage in private rate-fixing without state authority. If insurance companies enter into a private rate-fixing agreement, not authorized by state law, and if they enforce that agreement by acts of boycott, coercion, or intimidation against any other business or person — insurance company, agent, other trader, or policyholder — then their conduct comes within the boycott exception, and they are subject to Sherman Act liability. The agreement itself is nothing without the tools to carry it out; and Congress denied the insurance companies those tools when it enacted §3(b).

The foregoing points are summed up in a colloquy between Senators Barkley and O'Mahoney[8] towards the end of the debate:

> Mr. BARKLEY..... Why was the language limited to boycott, coercion, or intimidation, which does not include combinations that do not involve either boycott, coercion, or intimidation?
>
> "Mr. O'MAHONEY: Because the committee was cognizant of the fact that many salutary combinations might be proposed and which ought to be approved, to which there was no objection. *From the very beginning, Mr. President, of this controversy over insurance I have always taken the position that I saw no objection to combinations or agreements among*

[8] Senator O'Mahoney, who had expressed reservations about the bill in the initial Senate debates, was one of the Senate conferees (along with the co-authors) in the House-Senate conference that gave the bill its final form. He strongly supported the bill in the final Senate debate.

> *the companies in the public interest provided those combinations and agreements were in the open and approved by law. Public supervision of agreements is essential.*
>
> "Mr. BARKLEY: Let me ask this question: Suppose the regulatory laws of a State permit combinations which might be regarded as violative of the Sherman or Clayton Acts, and over which Congress itself might wish to exercise jurisdiction, are such combinations so sanctioned by the laws of the States to be allowed, even if Congress itself should decide to exercise jurisdiction?
>
> "Mr. O'MAHONEY: No; *my judgment is that every effective combination or agreement to carry out a program against the public interest of which I have had any knowledge in this whole insurance study would be prohibited by the very section [3(b)] the Senator from Kentucky has quoted.*" *Id.* at 1486 (emphasis added).

Once again, the point is emphatically made that the Sherman Act violations permitted to the insurance companies are only those that are authorized and supervised by the states. And once again the broadest possible scope is given to the boycott exception. Senator O'Mahoney says that it would prohibit "*every* effective combination or agreement to carry out a program against the public interest." *Id.* (emphasis added). That statement, as the court below pointed out, "could not be more unrestricted." 555 F.2d at 12 (A. 68). "The public interest" unquestionably includes the interests of consumers. Yet petitioners would have this Court hold, contrary to both the legislative history and common sense, that §3(b) prohibits every action that harms the interests of consumers of insurance *unless* the action is perpetrated directly against them.

The sum and substance of these debates is that Congress felt that certain kinds of concerted activity by insurance companies — specifically, the fixing of the rates and terms of insurance contracts — could be in the public interest if authorized and supervised by the states. But private anti-competitive agreements, unauthorized by the states, were not to be tolerated; and, to ensure that such agreements could not be enforced, Congress provided that the Sherman Act would remain applicable to all acts or agreements of boycott, coercion, or intimidation. The boycott exception also insures that no state can authorize or permit such predatory behavior. The respondents submit that a horizontal agreement among insurers (1) not to compete and (2) to fix the terms of medical malpractice insurance, arrived at in secret without state authority or permission, and enforced by means of a boycott against policyholders and by acts of coercion and intimidation against those policyholders hardy enough to protest, is precisely the kind of predatory behavior, not in the public interest, that Congress sought to protect against by means of the boycott exception. *Cf. Maryland & Virginia Milk Producers Association* v. *United States,* 362 U.S. 458 (1960) (Capper-Volstead Act antitrust exemption does not authorize agricultural cooperatives to engage in predatory activities otherwise violative of the Sherman Act).

The petitioners seek support for their narrow construction of the boycott exception in Senator O'Mahoney's condemnation of the rules of the Insurance Executives Association, which "undertook by regulation to coerce, intimidate, and boycott its own members and compel them to obey the rules and regulations the association itself prescribed." 91 Cong. Rec. 1486 (1945). But Senator O'Mahoney never said that such intra-industry activities were the only target of the boycott exception. To the contrary, he stated at the outset of his remarks about the Insurance

Executives Association that the boycott exception "outlaws completely *all* steps by which small groups have attempted to establish themselves in control in the great interstate and international business of insurance." *Id.* at 1485. There is certainly no warrant here for the view that the boycott exception does not protect policyholders. In view of this and numerous other sweeping statements already quoted, it is fallacious to argue that the single example given by Senator O'Mahoney was intended to demonstrate the full scope of the boycott exception. Rather, that example "demonstrates only that such blacklists were *a* concern of the Congress — perhaps even the principal concern — but does not show that they were the *only* concern." *Proctor* v. *State Farm Mutual Automobile Insurance Co., supra,* 561 F.2d at 273; *accord, Barry* v. *St. Paul Fire & Marine Insurance Co.,* 555 F.2d at 12 (A.67). We submit that petitioners' argument perverts the legislative history by presenting a mere example as if it were an all-encompassing definition.

The petitioners concede this point when they admit that no violence is done to the legislative history if the boycott exception is read to include boycotts against other (*i.e.,* non-insurance) traders. (Pet. Br. at 30.) Since no senator or representative ever mentioned such boycotts in the debates, petitioners thus concede that the activities of the Insurance Executives Association cited by Senator O'Mahoney do not describe the full scope of the boycott exception; and drawing the line at "other traders" would be every bit as arbitrary, artificial and unsupported by the legislative history as drawing it at "other insurance companies or agents."

Indeed, Senator O'Mahoney said that the purpose of the bill was to outlaw "regulation by private combinations and groups." 91 Cong. Rec. 1483, col. 3 (1945). He stated in the strongest possible terms Congress' hostility to pri-

vate lawmaking by insurance companies. *Id.* at 1485, col. 2-3. Private regulation is exactly what is alleged here — private regulation of the availability and terms of insurance. It is highly unlikely that Congress intended to prohibit private lawmaking with respect to other insurance companies and agents and yet condone it with respect to policyholders or other traders. The anticompetitive effect is the same in each case: private combinations are making decisions that should only be made individually in a free market or publicly by state regulators. Moreover, policyholders are unorganized and have no bargaining power and are therefore most vulnerable to such practices.

It must not be forgotten that Congress took the words "boycott, coercion, or intimidation" from the *South-Eastern Underwriters* case, and that the conduct thus described in that case included concerted refusals to deal with policyholders. One of the objectives of the conspiracy in *South-Eastern Underwriters* was "to compel persons who needed insurance to buy only from S.E.U.A. members on S.E.U.A. terms," 322 U.S. at 535; and the method used to attain that objective was threatening the policyholders of non-S.E.U.A. companies "with boycotts and withdrawal of all patronage," *id.* at 536.

The boycott exception was clearly intended "to preserve *South-Eastern Underwriters* to the extent that the latter subjected acts of 'boycott, coercion, or intimidation' to the prohibitions of the Sherman Act." *Proctor* v. *State Farm Automobile Insurance Co., supra,* 561 F.2d at 273. In the case at bar, as in *South-Eastern Underwriters,* insurance companies have dictated the terms of insurance to policyholders and have used collective refusal to deal as a tool to attain their objective. Surely Congress intended these activities to fall within the boycott exception, since such activities are "explicitly addressed in the case from which its language is drawn." *Id.* at 274.

Finally, any interpretation of the boycott exception must take account of the fact, frequently noted in the debates, that the Act was compromise legislation. *E.g.,* 91 Cong. Rec. 479, col. 1 (1945) (remarks of Senator Ferguson); *id.* at 1085-86 (remarks of Representative Walter). It was a compromise between "the position taken by the Senator from Florida [Pepper] and the position taken by . . . the proponents of the Bailey bill," *id.* at 1481, col. 1 (remarks of Senator Murdock)—that is, between those who wanted no antitrust exemption at all for the insurance industry and those who wanted that industry to have complete immunity from all federal regulation, particularly including the antitrust laws. A proposal for complete immunity had, of course, been defeated during the previous session of Congress. *Id.* at 1477, col. 3 (remarks of Senator Pepper); *id.* at 1487, col. 3 (remarks of Senator Barkley).

If we ignore the boycott exception for the moment, the proponents of complete immunity achieved the following through the enactment of McCarran-Ferguson: (1) state regulation and taxation are insulated from constitutional challenges under the commerce clause as undue burdens on interstate commerce; (2) state regulation and taxation are valid as against any federal law that does not specifically relate to the business of insurance; and (3) state regulation completely preempts the Sherman, Clayton, Federal Trade Commission and Robinson-Patman Acts.

The boycott exception only applies a portion of the Sherman Act to the insurance industry; it does not affect the industry's immunity from other federal regulation. If it is given the artifically narrow reading proposed by petitioners, then the proponents of full antitrust liability received almost nothing in exchange for their support. Yet the overwhelming vote in favor of the bill in both houses,

see id. at 1093-94, 1396, 1488-89, suggests that those persons were for the most part satisfied with the compromise. It is hard to believe "that they would have been at all satisfied if they had understood that 'boycott' was a code word confined to industry personnel." *Barry* v. *St. Paul Fire & Marine Insurance Co.*, 555 F.2d at 12 (A.67). We submit that Senator O'Mahoney, who began as a skeptic and ended by supporting the bill, expressed the clear intent of Congress when he said that the boycott exception would prohibit "*every* effective combination or agreement to carry out a program against the public interest." 91 Cong. Rec. 1486, col. 2 (1945).

Moreover, one of the chief parties to this compromise was the insurance industry itself, which was heavily involved in drafting the bill and which gave its approval thereto. *See* "Conclusion," S. Rep. No. 20, 79th Cong., 1st Sess. (1945); "Conclusion," H.R. Rep. No. 143, 79th Cong., 1st Sess. (1945); 91 Cong. Rec. 479, col. 1 (remarks of Senator Ferguson); *id.* at 1086, col. 1 (remarks of Representative Walter). The insurance companies obviously sought the greatest possible freedom from federal regulation. If they could have achieved an express limitation on the scope of the boycott exception, they surely would have done so — by the simple expedient of adding the words "of other insurance companies or agents" after the word "intimidation" in §3(b). Certainly, it cannot be assumed that these experienced draftsmen and lobbyists would have left such an important limitation unspoken.

Without §3(b), the Act is practically the same as the grant of total immunity that Congress had rejected just one year earlier. In proposing their exceedingly narrow and highly artificial interpretation of §3(b), petitioners are in effect asking this Court to give them by way of construction what the industry was unable to get from Congress. We respectfully urge the Court to decline that invitation.

The First Circuit was clearly correct when it concluded that the legislative history contains no "evidence that would justify . . . reading the boycott provision in the special way urged by [petitioners]." 555 F.2d at 12 (A. 68).

C. *A narrow reading of section 3(b) would be inconsistent with this Court's interpretation of the section 2(b) antitrust exemption.*

There is an obvious relationship between the scope of the boycott exception on the one hand and the scope of the antitrust exemption on the other since between them they cover the field. This Court has consistently given the § 2(b) exemption from federal regulation a narrow scope—even in the face of dissenting opinions arguing, as petitioners do here, that the purpose of the McCarran-Ferguson Act was broadly to withdraw the federal government from the field of insurance regulation.

In *SEC* v. *Variable Annuity Life Insurance Co. of America*, 359 U.S. 65 (1959), the Court held that variable annuity contracts are not insurance contracts and therefore are subject to SEC regulation. Justice Harlan, dissenting, argued that the policy of the McCarran-Ferguson Act was to "[leave] regulation of the business of insurance entirely to the States," *id.* at 96, *see also id.* at 99, and that the holding of the majority was contrary to that policy.

The following year the Court decided *FTC* v. *Travelers Health Association*, 362 U.S. 293 (1960), in which the FTC sought to regulate the activities of a Nebraska corporation that sold mail-order insurance throughout the United States. A Nebraska statute prohibited deceptive practices carried out either in Nebraska or in any other state by insurance companies domiciled in Nebraska. The Court held that Congress intended the Federal Trade Commission Act to be preempted only by regulation by the state in which the deception is practiced and in which it has its

impact. *Id.* at 298-99. Consequently, Nebraska's attempt to regulate the out-of-state mailings of its domiciliary did not deprive the FTC of jurisdiction. Justice Harlan again dissented, arguing that McCarran-Ferguson "pervasively restored to the States the regulation of the business of insurance," *id.* at 303, and that the majority's narrow interpretation of the concept of state regulation was inconsistent with the policy of the Act.

Most recently, in *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969), the Court held unanimously that a state law designed to protect insurance company stockholders was not a law regulating "the business of insurance" within the meaning of the Act and therefore was not preemptive of the federal securities laws. The Court rejected the argument that all the activities of insurance companies constitute "the business of insurance"; instead, it interpreted the statutory phrase narrowly, holding that it referred solely to the contract of insurance itself and to the insurer-policyholder relationship based upon that contract. *Id.* at 459-60; *see* Comment, *Federal Regulation of Insurance Companies: The Disappearing McCarran Act Exemption*, 1973 Duke L.J. 1340, 1345-48.

Thus, the Court has given narrow scope to every aspect of § 2(b) and correspondingly broad scope to permissible federal regulation of insurance companies.

Section 2(b) marks out the area within which the states may, if they choose, preempt federal regulation. In other words, to the extent that the policy of the Act is to withdraw the Federal Government from the field of insurance regulation, that policy is centrally expressed in § 2(b). Yet this Court, as we have shown, has not found that the field that Congress intended to leave to paramount state regulation is very broad.

By contrast, § 3(b)—the boycott exception—marks out the area within which the states *cannot* legislate. Thus, to the extent that the policy of the Act is that the core of

the Sherman Act shall retain primacy in the area of insurance, that policy is centrally expressed in § 3(b). Consequently, in view of the broad scope this Court has given to federal concerns under § 2(b), it would be quite incongruous to give narrow scope to those same concerns under § 3(b), which makes those concerns paramount.

III. The Boycott Exception Subjects Even the Core of the Business of Insurance to Sherman Act Regulation.

In effect, petitioners argue that the boycott exception must be construed so that "the business of insurance" as defined in *SEC* v. *National Securities, Inc., supra,*—*i.e.*, the insurer's relationship with its policyholders—is absolutely immune from antitrust liability. They take the position that Congress intended to leave the protection of policyholders entirely to the states. The trouble with this argument is that the boycott exception is precisely that—an *exception* to the immunity granted in § 2(b). The boycott exception says that "[*n*]*othing* contained in this chapter —and that includes § 2(b)—shall preclude the application of the Sherman Act to agreements or acts of boycott, coercion, or intimidation. Numerous statements in the legislative history explicitly show that the states, even in the course of exercising their right to regulate "the business of insurance," cannot authorize boycott, coercion, or intimidation. *See* Point II, *supra*. Thus, no aspect of the business of insurance is immune from antitrust liability with respect to the proscribed practices.

The point was made in *California League of Independent Insurance Producers* v. *Aetna Casualty & Surety Co.*, 179 F. Supp. 65 (N.D. Cal. 1959), in which the plaintiff insurance agents alleged a conspiracy to fix commission rates and a boycott of agents who refused to accede to the fixed

rates. The fixing of commission rates was regulated by the state. Nevertheless, the court held that the boycott exception "permits a Sherman Act suit in a state regulated phase of the insurance industry if conduct amounts to boycott, coercion or intimidation. These are the methods to effectuate the refusal to deal except at the agreed price." *Id.* at 66; *see* Minnesota Note, 46 Minn. L. Rev. at 1104-05.

The same conclusion was reached by the District of Columbia Circuit in the recent case of *Proctor* v. *State Farm Mutual Automobile Insurance Co., supra.* The complaint in *Proctor* alleged that the defendant insurance companies had conspired to fix the prices they would pay for repairs to insured automobiles and had entered into a group boycott of repair shops that would not agree to accept the prevailing rates as payment in full. The court held that the price-fixing agreement fell within the core of "the business of insurance" as defined in *National Securities.* 561 F.2d at 267-70. Nevertheless, the court concluded that the alleged boycott of repair shops fell within the boycott exception. *Id.* at 275.

Thus, even if there were a conflict between state regulations and the Sherman Act in matters falling within the scope of the boycott exception, the Sherman Act would control. In fact, however, as we show in Point IV, the issue of state-federal conflict raised by petitioners and *amici* in this case is a spurious issue, because, *inter alia,* no state-approved conduct is challenged in this case.

IV. There Is No Conflict Between State Regulation of Insurance Rates and Terms and Federal Control of Boycott, Coercion and Intimidation.

There is nothing novel about the idea that state regulation of an industry or profession should coexist with federal regulation under the antitrust laws. Contrary to the

suggestion of the National Association of Insurance Commissioners (NAIC) in its *amicus curiae* brief (NAIC Br. at 19), the antitrust laws are an adjunct to state regulation, not an alternative. *Cf. Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 792-93 (1975). For example, the State of Rhode Island regulates almost fifty businesses and professions, ranging from architects to wrecking contractors. R.I. Gen. Laws 1956 (1976 Reenactment) Title 5 (see Appendix A). Yet all of these businesses and professions are subject to the antitrust laws; and there is no suggestion that there is any conflict, in the ordinary course of affairs. "Regulated industries are not *per se* exempt from the Sherman Act." *Georgia* v. *Pennsylvania R.R.,* 324 U.S. 439, 456 (1945).

The fixing of rates is at the heart of the state-regulated "business of insurance," as the *National Securities* case held. Yet this Court has recognized that there is no conflict between a scheme of administered price regulation and antitrust liability for illegal price-fixing schemes. In *Georgia* v. *Pennsylvania R.R., supra,* the complaint alleged an illegal price-fixing conspiracy enforced by coercion. *Id.* at 443-45. The defendants argued that the Interstate Commerce Act required them to agree upon joint through rates. "That is true," said the Court:

> "But it would be a perversion of those sections to hold that they legalize a rate-fixing combination of the character alleged to exist here.
>
> • • •
>
> "[W]e find no warrant in the Interstate Commerce Act and the Sherman Act for saying that the authority to fix joint through rates clothes with legality a conspiracy to discriminate against a State or a region, to use coercion in the fixing of rates, or to put in the hands of a combination of carriers a veto power over rates proposed by a single carrier. . . . [By this con-

spiracy a] monopoly power is created under the aegis of private parties without Congressional sanction and without governmental supervision or control." *Id.* at 457, 458-59.

Similarly, if the boycott exception does not cover the alleged conduct of petitioners in this case, then private parties are permitted to control the market without congressional sanction and without state supervision or control.

The Court in the *Pennsylvania R.R.* case went on to explain why there was no conflict between ICC control over ratemaking and the imposition of antitrust liability upon the defendants for their private rate-fixing conspiracy:

> "*The present bill does not seek to have the Court act in the place of the Commission. It seeks to remove from the field of rate-making the influences of a combination which exceed the limits of the collaboration authorized for the fixing of joint through rates. It seeks to put an end to discriminatory and coercive practices.* The aim is to make it possible for individual carriers to perform their duty under the Act, so that whatever tariffs may be continued in effect or superseded by new ones may be tariffs which are free from the restrictive, discriminatory, and coercive influences of the combination. *That is not to undercut or impair the primary jurisdiction of the Commission over rates.* It is to free the rate-making function of the influences of a conspiracy over which the Commission has no authority but which if proven to exist can only hinder the Commission in the tasks with which it is confronted." *Id.* at 459-60 (emphasis added).

Similarly, the present suit seeks to remove the influence of a private conspiracy over the availability, terms and

conditions of medical malpractice insurance in Rhode Island. As we have shown, the legislative history is clear that the states have no authority with respect to boycott, coercion, or intimidation; those are matters for exclusive federal control. To attack the alleged conspiracy, therefore, is not to interfere with Rhode Island's jurisdiction over rates and terms of insurance.

In the *National Securities* case, the SEC sought, as a remedy for Rule 10b-5 violations, to unwind an insurance company merger that had been approved by the Arizona Director of Insurance. Since state law required the director to find that the merger would not "substantially reduce the security of and service to be rendered to policyholders," the Court found that his approval clearly related to "the business of insurance." 393 U.S. at 462. The Court nevertheless found that there was no state-federal conflict, because, *inter alia,* "Arizona has not commanded something which the Federal Government seeks to prohibit. It has permitted respondents to consummate the merger; it did not order them to do so." *Id.* at 463. In the case at bar, the state has not even permitted respondents to undertake the agreements and activities alleged in the complaint; it has had nothing whatever to do with those agreements and acts. The alleged conduct of respondents took place entirely outside the structure of state regulation and without state approval or permission. Thus, respondents do not seek to apply the Sherman Act in a way that would defeat the policy of the state. *Cf. United States* v. *Frankfort Distilleries, Inc., supra,* 324 U.S. at 299.

The petitioners claim that the relief sought here would interfere in some way with state policy as expressed in the creation of the Joint Underwriting Association (JUA). (Pet. Br. at 37-38).[9] This suit does not seek to enjoin any-

[9] The petitioners also contend that there is no need for federal control of the alleged anticompetitive conduct because the state

thing done by the JUA; it seeks to enjoin an agreement made by petitioners before the JUA was established. It is true that the JUA is authorized to issue both claims made and occurrence basis policies; but that does not mean that the members of the JUA can agree privately not to issue occurrence basis policies. An injunction against that agreement does not interfere with the operation of the JUA or with any state policy.

The fundamental relief sought in this suit is that petitioners be enjoined from boycotting, coercing and intimidating respondent physicians into accepting insurance policies on unreasonable terms, and that petitioners pay damages for having engaged in such conduct. This clearly does not conflict with any state goal, policy or regulatory activity. The respondents are confident that the district court can accommodate the details of any relief granted to the needs of the state's regulatory program; the federal courts have considerable experience in making such accommodations, and the district court has broad power to tailor relief as a court of equity.

V. The First Circuit's Interpretation of Section 3(b) Will Not Subject Insurance Companies to Antitrust Liability for Legitimate, State-authorized Activities.

The central argument presented in the *amicus curiae* briefs of the NAIC and the American Insurance Association, *et al.* (AIA) is that reading § 3(b) to protect policy-

has "dealt with" the problem by establishing the JUA. (Pet. Br. at 36-37). This seems to amount to a contention that the creation of the JUA makes this case moot. That is contrary to the position taken by petitioners before the First Circuit, where all parties agreed that the establishment of the JUA did not moot the case. Furthermore, respondents allege that petitioners' fraudulent acts, misrepresentations and anticompetitive activities created the purported "medical malpractice insurance crisis" that led to the formation of the JUA. (A. 35-36.) Thus, the JUA is a symptom of the problem, not a cure.

holders will subject insurance companies to wide-open antitrust liability for legitimate, state-regulated activities.

The NAIC complains that application of the boycott exception to protect policyholders will interfere with state regulation of insurance rates, policy forms, solvency and availability. (NAIC Br. at 9-10). With respect to rates and forms, the NAIC, like petitioners, depends upon the argument that any antitrust conspiracy can be pleaded as a boycott—*e.g.*, a price-fixing agreement is a concerted refusal to deal except at fixed rates; a conspiracy to fix terms is a concerted refusal to deal except on the terms stated.

The respondents submit that petitioners and *amici* have grossly exaggerated this "creative pleading" problem. The courts are quite capable of distinguishing between boycotts and other antitrust conspiracies on a case-by-case basis. *See Proctor* v. *State Farm Mutual Automobile Insurance Co., supra,* 561 F.2d at 274 & n.21.

In view of Congress' broad purpose to deprive private anticompetitive agreements of their efficacy by means of § 3(b) (*see* Point II, *supra*), it may well be that at least some cases of refusal to deal "except on specified terms" should be treated as boycotts. *See California League of Independent Insurance Producers* v. *Aetna Casualty & Surety Co., supra;* Minnesota Note, 46 Minn. L. Rev. at 1105 n.93. *See also* Note, *Concerted Refusals to Deal Under the Federal Antitrust Laws*, 71 Harv. L. Rev. 1531, (1958). That issue is not presented by this case, however. The complaint in this case alleges that three of petitioners engaged in a concerted refusal to sell respondent physicians *any* malpractice insurance on *any* terms. That is a traditional boycott—*i.e.*, a complete refusal to deal under terms.

With respect to state regulation of insurer solvency, the NAIC's argument ignores the fact that it takes concerted action to make a boycott. This Court established long ago that unilateral refusals to deal do not violate the antitrust

laws. *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919). Thus, it is not a boycott if "an insurer, under its own volition or pursuant to an insurance commissioner's suggestion, reduce[s] its book of business" in order to maintain its solvency. (NAIC Br. at 23.) Nor is it even remotely possible that an insurance commissioner's disapproval of a rate filing or reimposition of rate filing requirements (NAIC Br. at 26) could be construed as a boycott. *Parker* v. *Brown*, 317 U.S. 341 (1943).[10]

The NAIC is joined by the AIA in its fourth point—that state-regulated insurance pools and other joint marketing mechanisms will be vulnerable to antitrust attacks under the First Circuit's interpretation of the boycott exception.[11] At the outset, it should be noted that, as *amici* themselves vigorously assert, the purpose of such mechanisms is to provide insurance, not to deny it. (AIA Br. at 4-16; NAIC Br. at 13-16.) It is fair to assume that refusal of coverage

[10] Petitioners and *amici* make much of the supposed insufficiency of *Parker* v. *Brown*, to shield legitimate state regulatory activity from antitrust liability. *See Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976). Obviously, the McCarran-Ferguson Act shields from antitrust liability some state-authorized activities, such as the use of rating bureaus, that probably would not be protected under *Cantor*. When an insurer engages in boycott, coercion, or intimidation, however, there is no reason why it should have greater protection from Sherman Act liability than *Parker* provides to other state-regulated industries in similar circumstances.

[11] Respondents vigorously protest the AIA's recital of the alleged genesis of the so-called "medical malpractice insurance crisis" that led to the establishment of the JUAs. (AIA Br. at 6-9.) To give such a one-sided view of a controversial issue that is completely irrelevant to the case at bar oversteps the function of an *amicus* brief. There is nothing in the record before this Court to support the AIA's argument, which relies largely on the industry's own study. (AIA Br. at 7-9 nn.3-6). In respondents' view, the "crisis" was contrived by the insurance companies themselves, for the purpose of driving up rates and for other purposes (*see* note 14, *infra*); and respondents could, if it were relevant, provide ample documentation to support their view. The respondents submit that the AIA's discussion of this issue is unfair, misleading and an imposition on this Court.

under these mechanisms is a rare event. Consequently, the argument of *amici* that the continued existence of such pools will be endangered if policyholders are protected by the boycott exception seems unwarranted.[12]

Assuming arguendo, however, that coverage will sometimes be denied by such mechanisms, the AIA voices the fear that such refusals will be deemed per se violations of the Sherman Act. (AIA Br. at 16-20.) It is true that this Court has held certain boycotts to be per se antitrust violations. *E.g., Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). A number of court of appeals, however, have declined to apply the per se rule to all boycotts. *E.g., Mackey* v. *NFL*, 543 F.2d 606, 618-22 (8th Cir. 1976) ("Rozelle Rule" is a boycott, but is subject to rule of reason analysis); *E. A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Committee*, 467 F.2d 178, 185-88 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 75-80 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

The problem of the application of the per se rule to boycotts has been the subject of extensive discussion. *E.g.*, McCormick, *Group Boycotts: Per Se or Not Per Se—That is the Question*, 7 Seton Hall L. Rev. 703 (1976); Woolley, *Is a Boycott a Per Se Violation of the Antitrust Laws?*, 27 Rutgers L. Rev. 773 (1974); Comment, *A Re-Examination of the Boycott Per Se Rule in Antitrust Law*, 48 Temple L.Q. 126 (1974). Most commentators appear to agree that it is unreasonable to make all boycotts per se violations. *See Ruddy Brook Clothes, Inc.* v. *British & Foreign Marine Insurance Co.*, 195 F.2d 86, 89 (7th Cir. 1952).

[12] The AIA's and petitioners' solicitude for the JUAs is somewhat puzzling, since the insurance industry strenuously opposed the establishment of the JUAs as an unwarranted interference with the free market.

In an influential article, Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. Pa. L. Rev. 847 (1955), the author distinguishes between concerted refusals to deal intended to coerce the conduct of the third parties or to secure their removal from competition, which he says should be treated as per se violations, and concerted refusals involving acceptance of limitations on individual freedom to deal but not intended to coerce or eliminate the competition of third parties, which he says should be analyzed under the rule of reason. He emphasizes, however, that "*all* . . . situations [that] involve an agreement between two or more persons under which one or more of them agree not to deal with third persons *and for that reason foreclose a part of the market to such third persons* . . . are . . . subject to scrutiny under the antitrust laws." *Id.* at 877 (emphasis added). Thus, since the agreement alleged in this case coerced respondent physicians and closed a substantial portion of the malpractice insurance market to them, that agreement must be subjected to scrutiny under the antitrust laws. It may well be a *per se* violation; but that is not at issue at this stage of the case.

The First Circuit recognized that the proper approach is judicious application of the *per se* rule, not an artificially narrow definition of the word "boycott." 555 F.2d at 7-8 n.4 (A. 57-58 n.4). *See also* Note, *Insurance Regulation and Antitrust Exemptions: McCarran-Ferguson, the Boycott Exception, and the Public Interest*, 27 Rutgers L. Rev. 140, 144-49 (1973).

We submit that this approach will meet the concerns raised by *amici*. If a pool or other joint insurance mechanism denies coverage for legitimate insurance reasons, then under the rule of reason there is clearly no violation, since there is neither anticompetitive motive nor anticompetitive effect. Nor is there any reason to assume that the JUAs or other joint mechanisms will engage in coercive

or predatory activities. If they do, however, there is no reason why they should be immune from liability under § 3(b), which was enacted to prohibit such activities.

Similarly, refusal of coverage on the basis of uniform risk classifications (AIA Br. at 20-23) will be readily justifiable under the rule of reason, unless insurers engage in concerted manipulation of the classification process.

It is important to recognize, however, that the issues raised by *amici*—denial of coverage by an insurance pool, or by individual insurers based on uniform risk classifications—are not presented in this case. In this case, four insurers allegedly entered into a private conspiracy whereby three of them agreed not to sell insurance to the customers of the fourth. It is noteworthy that none of those urging reversal is trying to justify this conduct or to argue that it is not a proper subject of antitrust liability. Their argument, rather, is that to permit this suit to proceed will improperly subject other activities to antitrust liability. This attempt to use the legitimate activities of authorized joint entities to shield the illegitimate activities of a private combination should be rejected.

The respondents submit that antitrust doctrine is sufficiently flexible to protect legitimate, authorized joint activities. The wholly unjustified (and unjustifiable) conduct alleged in this case should not be immunized from the operation of the Sherman Act, contrary to the intent of Congress, merely to avoid the fanciful problems raised by *amici*.

VI. Full Application of Section 3(b) to the Insurance Industry Is Urgently Needed to Fulfill the Intent of Congress, to Check Insurance Company Abuses and to Carry Out the Historic Consumer Protection Function of the Sherman Act.

In *South-Eastern Underwriters*, this Court reversed a 75-year-old precedent in holding that the business of insur-

ance is commerce and therefore is subject to the antitrust laws. During the McCarran-Ferguson Act debates, Senator Pepper referred to that case as "eminently correct, and . . . an example of justice too long delayed." 91 Cong. Rec. 1443 (1945). The respondents respectfully submit that a similar situation confronts the Court today. Justice for policyholders under § 3(b) has been too long delayed. There is an important difference, however, between the two situations: this case, unlike *South-Eastern Underwriters,* does not require the reversal of any precedent. This Court has never construed the boycott exception. We respectfully submit, therefore, that Judge Campbell, dissenting below, erred when he said that the First Circuit majority had "reinterpret[ed] the McCarran-Ferguson Act thirty years after enactment." 555 F.2d at 15 (A. 75). There is no question of reinterpretation here. The respondents are only asking this Court to enforce the clear intent of Congress that all victims of insurance company boycott, coercion, or intimidation, not just other insurance companies and agents, be provided with the protection of the Sherman Act through § 3(b).

The petitioners say that the decision below will "thrust" a consumer protection function upon the federal courts (Pet. Br. at 41), as if that were an improper function for federal courts under the antitrust laws. In fact, consumer protection is one of the historic functions of the Sherman Act. See Point I, *supra.* In light of this historic purpose, it would be odd indeed to hold that Congress intended to foreclose the protection of the boycott provision to consumers.

Moreover, the word "consumer" has special significance in the field of insurance. "Consumers" are usually thought of as opposed to "business"—ultimate purchasers, that is, as opposed to purchasers for resale. But everyone who buys insurance is an ultimate purchaser. The policyholders

who seek the protection of the boycott exception are not just individuals purchasing automobile insurance or home fire insurance; they include businesses of every description. Business cannot operate without insurance. The insurance industry never tires of reminding us that the wheels of commerce would grind to a halt without insurance. The respondents agree that this is so and submit that it provides compelling support for the view that Congress did not intend to leave the protection of policyholders from predatory insurance practices to the states.

The form of regulation enacted by the states in response to the McCarran-Ferguson Act is not calculated to protect policyholders from insurance company conspiracies directed against them. All fifty states have enacted Fair Trade Practices applicable to the insurance business. AIA Br. at 16 n.15; Minnesota Note, 46 Minn. L. Rev. at 1093. These acts provide no consumer remedy for unfair trade practices. The Rhode Island law is typical. Many of the practices it proscribes can be directed against policyholders. R.I. Gen. Laws 1956 (1968 Reenactment) § 27-29-4. But the law gives policyholders no right to initiate either administrative or judicial proceedings to protect their rights. Only the insurance commissioner can take action against an insurer. *Id.* §§ 27-29-5, 27-29-8. If he takes no action, policyholders are remediless under the state law. Thus, the consumer remedies of the Sherman Act supplement, rather than replace, the state regulations.

Despite the foregoing, petitioners and *amici* argue that Congress intended to leave the protection of policyholders entirely to the states. In fact, Congress clearly feared that state regulation of antitrust violations—as opposed to state regulation of rates and policy terms—would be inadequate.[13]

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[13] It should be noted that the maximum penalty against a Rhode Island insurer for willfully violating a cease and desist order is $500. R.I. Gen. Laws 1956 (1968 Reenactment) § 27-29-9.

See 91 Cong. Rec. 1444 (1945) (colloquy among Senators Pepper, O'Mahoney, McCarran, White, Murdock and Barkley). That fear, we submit, has been realized. Insurance is a vast interstate industry with a stranglehold on the commerce of the nation. By threatening to pull out of a market if their demands are not met, insurance companies can exercise substantial control over state regulators.[14] The federal courts are free of such influences. That is why Congress intended to leave federal regulation paramount with respect to boycott, coercion and intimidation.

Furthermore, at least some state insurance regulators apparently have more sympathy for the insurance companies than for the public on whose behalf they are supposed to regulate. This case presents the spectacle of the National Association of Insurance Commissioners seeking to shield the activities of insurance companies from the Sherman Act —even the predatory activities that Congress clearly wished to outlaw through § 3(b).[15]

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[14] State legislatures are also subject to insurance company coercion. A perfect example of this is the "medical malpractice insurance crisis." Under insurance company pressure, many states, including Rhode Island, have enacted legislation, the constitutionality of which has not yet been tested, severely curtailing both common law and constitutional rights of the public in medical malpractice cases (*e.g.*, limitations on damages, denial of equal access to the courts, substantial denial of right to trial by jury, application of statutes of limitations to infants and abrogation of doctrines of liability).

[15] The most disturbing thing about the NAIC brief, however, is the implication it carries with it that it represents the views of all fifty insurance commissioners, or at least of a majority of them, and perhaps even of the fifty states. In fact, when respondents' permission for the filing of the NAIC brief was sought, counsel for the NAIC informed respondents' counsel that the decision to file the brief had been made by two commissioners: Lester Rawls of Oregon, president of the NAIC, and Harold McGuffy of Kentucky, chairman of the executive committee of the NAIC. Mr. Rawls subsequently resigned under fire from his post as Oregon Insurance Commissioner. *Wall Street Journal*, Nov. 29, 1977, p. 34. The NAIC as a group never voted either on the decision to appear as *amicus* or on the brief; no meeting of the executive committee, the board, or the membership was ever held with respect to this matter. Nor, to respondents' knowledge, was any action, legislative, administrative, or otherwise, taken by any state to approve this brief.

Section 3(b) specifically applies the Sherman Act to the business of insurance. What petitioners seek can only be described as an implied exemption—and implied exemptions from the antitrust laws are not favored. *Goldfarb* v. *Virginia State Bar, supra*, 421 U.S. at 787. To artificially narrow the boycott exception, in a manner supported neither by its language nor by its history, would be to abrogate a promise made by the Congress when it enacted 3(b)—namely, that insurance companies would find no shield in the McCarran-Ferguson Act for predatory anticompetitive activities, against whomever directed.

Conclusion

In his dissenting opinion in this case, Judge Campbell stated that one reason for his disagreement with the majority opinion was that it "introduces a new category of federal antitrust suit which will be very difficult to manage at a time when federal courts are strained to the limit." 555 F.2d at 15 (A. 75). With all respect, respondents submit that this consideration is irrelevant to the decision of this case. It is the responsibility of the courts to deal with suits on their merits, whether there be few suits or many. *See Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 410-11 (1971) (Harlan, J., concurring). Courts were established to provide legal redress, and "the existence of a multitude of claims merely shows society's pressing need for [such] redress." *Dillon* v. *Legg*, 68 Cal. 2d 728, 735 n.3, 441 P.2d 912, 917 n.3, 69 Cal.

Rptr. 72, 77 n.3 (1968). Under §3(b), respondents are clearly entitled to redress in federal court for the injuries alleged here.

For the reasons set forth herein, the judgment of the United States Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

LEONARD DECOF
LEONARD DECOF, LTD.
111 Wayland Avenue
Providence, Rhode Island 02906
Attorney for Respondents

Of counsel:
MARK S. MANDELL
MARTIN W. AISENBERG
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APPENDIX A

General Laws of Rhode Island, 1956 (1976 Reenactment)

TITLE 5
BUSINESSES AND PROFESSIONS

CHAPTER

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2. BOWLING ALLEYS, BILLIARD TABLES, AND SHOOTING GALLERIES, §§ 5-2-1 to 5-2-14.
3. CERTIFIED PUBLIC ACCONTANTS, §§ 5-3-1 to 5-3-18.
4. COAL AND COKE DEALERS, §§ 5-4-1 to 5-4-23.
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16. LAUNDRIES, §§ 5-16-1 to 5-16-7.
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20. PLUMBERS, §§ 5-20-1 to 5-20-36.
20.5. REAL ESTATE BROKERS AND SALESMEN, §§ 5-20.5-1 to 5-20.5-22.
21. SECOND-HAND DEALERS, §§ 5-21-1 to 5-21-7.
22. SHOWS AND EXHIBITIONS, §§ 5-22-1 to 5-22-25.
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CHAPTER

24. Taverns, Cookshops, and Oyster Houses, §§ 5-24-1 to 5-24-5.
25. Veterinarians, §§ 5-25-1 to 5-25-17.
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27. Barbers, §§ 5-27-1 to 5-27-34.
28. [Repealed.]
29. Chiropodists, §§ 5-29-1 to 5-29-18.
30. Chiropractors, §§ 5-30-1 to 5-30-17.
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37. Physicians and Surgeons, §§ 5-37-1 to 5-37-21.
38. Automobile Body Repair Shops, §§ 5-38-1 to 5-38-24.
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50. Health Clubs, §§ 5-50-1 to 5-50-6.
51. Rhode Island State Board of Examiners of Landscape Architects, §§ 5-51-1 to 5-51-14.

FOR ARGUMENT

IN THE

Supreme Court of the United States

October Term, 1977

Supreme Court, U. S.
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ST. PAUL FIRE & MARINE INSURANCE CO., AETNA CASUALTY & SURETY CO., TRAVELERS INDEMNITY OF RHODE ISLAND, TRAVELERS INDEMNITY CO. OF RHODE ISLAND, TRAVELERS INSURANCE CO., HARTFORD CASUALTY COMPANY and HARTFORD FIRE INSURANCE CO.,

v. *Petitioners,*

DAVID M. BARRY, M.D., LEROY S. CHAPNICK, M.D., WALTER C. COTTER, M.D., PAUL J. M. HEALEY, M.D., ANTHONY F. MERLINO, M.D., PAUL B. METCALF, M.D., H. GERALD ROCK, M.D., and ROSARIO V. TOMASELLI, M.D.,

and

PENNY ANDREW, CONSTANCE V. BOISSE, CHRISTOPHER DANIELS, ARTHUR M. FERLAND, GLADYS L. SPAIGHT, and ALPHONSE D. VITULLO,
Respondents.

REPLY BRIEF FOR PETITIONERS

SIDNEY S. ROSDEITCHER
HOWARD S. VEISZ
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10022

THOMAS D. GIDLEY
STEPHEN J. CARLOTTI
HINCKLEY, ALLEN,
SALISBURY & PARSONS
2200 Industrial Bank Building
Providence, Rhode Island 02903

Attorneys for The
Aetna Casualty and Surety Company

CHARLES LISTER
JONATHAN M. WEISGALL
COVINGTON & BURLING
888 16th Street, N. W.
Washington, D. C. 20006

JOSEPH A. KELLY
CARROLL, KELLY & MURPHY
326 Industrial Bank Building
Providence, Rhode Island 02903

Attorneys for
Hartford Casualty Company and
Hartford Fire Insurance Company

WALKER B. COMEGYS
MARION K. LITTMAN
POWERS & HALL
30 Federal Street
Boston, Massachusetts 02110

KIRK HANSON
HANSON, CURRAN & PARKS
1210 Turks Head Building
Providence, Rhode Island 02903

Attorneys for
St. Paul Fire & Marine
Insurance Company

JOSEPH V. CAVANAGH
HIGGINS, CAVANAGH & COONEY
600 Turks Head Building
Providence, Rhode Island 02903

Attorneys for
Travelers Insurance Company

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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-240

ST. PAUL FIRE & MARINE INSURANCE COMPANY, *et al.*,

Petitioners,

v.

DAVID M. BARRY, M.D., *et al.*,

Respondents.

REPLY BRIEF FOR PETITIONERS

Preliminary Statement

This case raises a basic issue of statutory interpretation: How to harmonize the express exemption from the Sherman Act conferred on the business of insurance by Section 2(b) of the McCarran-Ferguson Act with the exception for "boycott, coercion, or intimidation" contained in Section 3(b) of that Act. We showed in our main brief that the First Circuit's expansive reading of "boycott" to encompass every conspiracy characterized as a concerted refusal to deal would reintroduce most of the Sherman Act to the area of insurance company-policyholder relations, thus nullifying the exemption and frustrating the Congressional purpose.

Neither respondents nor the Government address this issue. Indeed, respondents appear to embrace the view that the term "boycott" in Section 3(b) does in fact apply most of the Sherman Act to the business of insurance and that what is not picked up as a "boycott" can be brought within the phrase "coercion or intimidation."

Respondents and the Government argue that their reading is necessary to fulfill the consumer protection objectives of the Sherman Act. We do not quarrel with the proposition that the Sherman Act protects consumers. But we are here interpreting the McCarran-Ferguson Act, the primary purpose of which was to leave the protection of policyholders to state regulation and which, in Section 2(b), expressly withdraws the Sherman Act from this area where the states have enacted such regulation.

Respondents also appear to argue that the conduct alleged here falls within the boycott exception because it was not authorized by Rhode Island. Respondents confuse the question of whether conduct is "regulated" within the meaning of Section 2(b) of the Act with the separate question of whether conduct falls within the boycott exception of Section 3(b). Neither respondents nor the courts below have ever questioned that the conduct alleged here is "regulated" by the State of Rhode Island within the meaning of Section 2(b) of the Act. The legislative history, this Court's decision in *FTC* v. *National Casualty Co.*, 357 U.S. 560 (1958), and a long line of appellate decisions confirm that the state regulation necessary to trigger the exemption is not limited to statutes authorizing the conduct alleged.

Once it is shown that there is state regulation within the meaning of Section 2(b), the antitrust exemption ap-

plies unless the conduct falls within the boycott exception. The question of whether conduct is a "boycott" does not turn on the form of state regulation. Indeed, as respondents acknowledge, if the conduct is a boycott no form of state regulation—including specific authorization—can bring the McCarran-Ferguson exemption into play.

The only issue here is how to draw the line between boycotts and other combinations and conspiracies in restraint of trade covered by the Sherman Act, so as to give meaning to the express exemption in Section 2(b) of the McCarran-Ferguson Act. We contend that this line can be found in the boycott cases previously decided by this Court, including *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533 (1944)—the case from which the phrase "boycott, coercion, or intimidation" was taken. These cases show that the term boycott has been reserved for concerted refusals to deal which are employed to exclude competitors of one or more of the conspirators, or to regulate the competitive practices of the targets. Neither respondents nor the Government have cited any case which applied the term in any other context.

Without this limitation, the boycott exception could be used to apply the Sherman Act to every controversy between insurance companies and policyholders concerning the terms and availability of insurance, notwithstanding the policy of the McCarran-Ferguson Act to leave such controversies to state regulation. In the end, the position of respondents and the Government simply reflects their disagreement with Congress concerning the effectiveness of state regulation in this area. But disagreements concerning Congressional policy should be addressed to Congress;

this Court should not be asked effectively to repeal the Section 2(b) exemption through an overly expansive interpretation of the boycott exception.

I

The First Circuit's interpretation of the boycott exception nullifies the express Sherman Act exemption provided in Section 2(b) of the McCarran-Ferguson Act.

Respondents and the Government, like the First Circuit, define "boycott" to include any conduct characterized as a concerted refusal to deal. But they do not suggest how this definition would preserve any boundary between conduct covered by the boycott exception of Section 3(b) of the McCarran-Ferguson Act and other joint activity exempted from the Sherman Act by Section 2(b) of the McCarran-Ferguson Act. As we pointed out, price-fixing, agreements to fix terms or risk classifications, agreements not to compete, and other joint activities covered by the Sherman Act but not usually referred to as boycotts, could be characterized as concerted refusals to deal with as much justification as the conduct alleged here. (Petitioners' Main Brief at 14-20.)

Respondents and the Government contend that the complaint here alleges a complete refusal by three defendants to sell any insurance to the policyholders of the fourth and, accordingly, that this Court need not concern itself with other situations in which the conduct might be characterized as a concerted refusal to sell except on fixed terms. But they do not claim that there is any logical distinction between such conduct and the conduct alleged here. They

merely urge that such other situations be treated on a case-by-case basis. (Respondents' Br. at 43; Gov't Br. at 8, 23.)

As Professor Areeda has noted, "there is no sharp logical distinction between refusing to sell at all and refusing to sell except on condition." Areeda, *Antitrust Analysis* 280-81 (2d ed. 1974). The distinction drawn by respondents in this case between a "complete" refusal to deal and a refusal to deal except on terms is, in fact, wholly artificial.

The complaint does not simply allege a conspiracy in which "three insurance companies [refused] to sell medical malpractice insurance to a group of physicians." (Respondents' Br. at 7.)* The complaint alleges a conspiracy among four insurance companies by which St. Paul was willing to sell medical malpractice insurance, but only on a claimsmade basis, and St. Paul's dissatisfied policyholders were unable to obtain any malpractice insurance from the other three. The complaint is not that respondents were unable to obtain any malpractice insurance, but that they were unable to obtain such insurance on an occurrence basis. (A. 24-25, 28.)**

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* *See also*, Gov't Br. at 23.

** In fact, in their First Circuit brief, respondents characterized their complaint as follows:

> "The alleged unlawful agreement in question further provided that after the Defendant St. Paul had successfully coerced its policyholders into accepting the policy changes it proposed, each of the remaining co-Defendants were to similarly notify their clients that like changes would have to be made in the substantive provisions of their policy coverage. And, of course, St. Paul would then refuse to accept any new clients from the ranks of the policyholders of its co-conspirators." (Appellants' Br. at 6, Barry v. St. Paul Fire & Marine Ins. Co., 555 F.2d 3 (1st Cir. 1977).)

As far as respondents are concerned, there is nothing which distinguishes this situation from one in which all four insurers agreed to sell to respondents on an occurrence basis only. Accordingly, there is no reason to single out the conduct alleged here for treatment different from an alleged agreement not to sell except at fixed terms.

Moreover, a refusal by the three defendants to sell to insureds covered by the fourth is nothing more than a different way of saying that the three have entered into an agreement with the fourth not to compete for customers—conduct which has never been characterized as a boycott under the antitrust laws.

Unlike *South-Eastern Underwriters* and similar boycott cases, it is not claimed here that the concerted refusal to deal was used to pressure any company willing to provide respondents with occurrence basis insurance to discontinue selling it. Here, plaintiffs have simply converted into a concerted refusal to deal conduct which could have been described equally as an agreement not to compete or an agreement to fix the terms of malpractice insurance. By arguing that such "concerted refusals to deal" amount to boycotts, respondents thus erase all distinctions between boycotts and other joint activity covered by the Sherman Act and make application of the Section 2(b) exemption turn on niceties of pleading which have no substantive significance.

II

The scope of the boycott exception has nothing to do with the form of state regulation.

Respondents have confused the question of what conduct falls within the boycott exception with the separate question of what form of state regulation is adequate to invoke the Sherman Act exemption. If the conduct is not a boycott, it is exempted from the Sherman Act so long as the state has enacted regulation in the field, whether that regulation is in the form of authorization or proscription. Conversely, as respondents recognize, if the conduct is a boycott the McCarran-Ferguson antitrust exemption will not apply even if the state has specifically authorized it. (Respondents' Br. at 23, 26.)

There has never been any question that Rhode Island's regulation of the business of insurance is sufficient to trigger the Sherman Act exemption provided in Section 2(b) of the McCarran-Ferguson Act.* Nor could there be.

Section 2(b) withdraws the Sherman Act from the business of insurance whenever the State has enacted regulatory legislation which "generally proscribes . . . or permits or authorizes certain conduct on the part of insurance companies. . . ." *Ohio AFL-CIO* v. *Insurance Rating Board,*

* In the words of the Court of Appeals:

"The parties agree that defendants' acts were related to the business of insurance and that Rhode Island effectively regulates that business." (555 F.2d at 6, A. 54.)

451 F.2d 1178, 1181 (6th Cir. 1971), *cert. denied,* 409 U.S. 917 (1972).*

It has never been suggested that the 2(b) exemption applies only where conduct is authorized by state law or where state law is inconsistent with the federal antitrust laws. Indeed, this Court has already held that a state statute prohibiting unfair competitive practices in the insurance business, virtually identical to Rhode Island's Unfair Competition and Practices Law, was sufficient state regulation to trigger the 2(b) exemption. *FTC* v. *National Casualty Co.,* 357 U.S. 560 (1958). In holding that such prohibitory state regulation displaced the Federal Trade Commission Act, this Court stated:

> "... An examination of [the McCarran-Ferguson] statute and its legislative history establishes that the Act withdrew from the Federal Trade Commission the authority to regulate respondents' advertising practices in those States which are regulating those practices under their own laws."
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> * * *
>
> "Petitioner ... argues ... that even if the McCarran-Ferguson Act bars federal regulation where state regulation has been effectively applied, the exercise of Commission authority in these cases should be upheld

* *Accord,* Dexter v. Equitable Life Assurance Society, 527 F. 2d 233, 236 (2d Cir. 1975); Lawyers Title Company of Missouri v. St. Paul Title Insurance Corp., 526 F.2d 795, 797 (8th Cir. 1975); Addrisi v. Equitable Life Assurance Society of the United States, 503 F.2d 725 (9th Cir. 1974), *cert. denied,* 420 U.S. 929 (1975); Commander Leasing Company v. Transamerica Title Insurance Co., 477 F.2d 77 (10th Cir. 1973); Proctor v. State Farm Mutual Automobile Insurance Co., 406 F.Supp. 27 (D.D.C. 1975), *aff'd,* 561 F.2d 262 (D.C. Cir.), *petition for cert. filed,* No. 77-580, 46 U.S.L.W. 3294 (U.S. Oct. 19, 1977). Lawyer's Realty Corp. v. Peninsular Title Insurance Co., 428 F.Supp. 1288 (E.D. La.), *aff'd,* 550 F.2d 1035 (5th Cir. 1977).

> because the States have not 'regulated' within the meaning of the Section 2(b) proviso. This argument is not persuasive in the instant case. Each State in question has enacted prohibitory legislation which proscribes unfair insurance advertising and authorizes enforcement through a scheme of administrative supervision. . . ." (357 U.S. at 562-64.)

This Court's analysis is confirmed by the language of the Act. Section 3(a) of the Act provides that "until June 30, 1948, . . . the Sherman Act . . . shall not apply to the business of insurance . . ." Section 2(b) provides that "after June 30, 1948 . . . the Sherman Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law." The plain import of this language is that if the states enact regulatory legislation the situation created during the moratorium is preserved and, unless conduct falls within the boycott exception, the Sherman Act continues to be totally inapplicable to the business of insurance.

Moreover, if the antitrust exemption were limited only to situations where state regulation authorized conduct inconsistent with the Sherman Act, the express Sherman Act exemption in Section 2(b) would have been wholly unnecessary. The general provisions of Section 2(b), which provide that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede" state regulation of insurance, would have alone been sufficient to preclude application of the Sherman Act to conduct authorized by state regulation.

The legislative history also shows that application of the Sherman Act is precluded whenever the states enact

regulatory legislation—and not just where the states have authorized conduct inconsistent with the Sherman Act. As Senator Ferguson, the co-author of the McCarran-Ferguson Act, stated in a discussion of the final version of the bill:

> "... After the moratorium has expired, if a State has not legislated on the subjects covered by the three acts [the FTC Act, the Sherman Act, and the Clayton Act] to which reference has been made, those acts shall be applicable to the business of insurance. *But insofar as the State is concerned which has specifically legislated on the subject, the three acts shall not apply.* ..." (91 Cong. Rec. 1443 (1945).) (Emphasis supplied.)

Senator Pepper also acknowledged that:

> "... [T]he legal effect of the proviso which the Senator had just read [§ 2(b)] is that a State can absolutely prevent the applicability of the Sherman Anti-trust Act and the Clayton Act to insurance companies doing business in the State *by passing a State act which will make combinations and restraints of trade unlawful in that State.*" (91 Cong. Rec. 1444 (1945).) (Emphasis supplied.)*

Senator Murdock agreed:

> "... Insofar as [the States] fail to cover the same ground covered by the Sherman Act and the Clayton Act, those Acts become effective again." (91 Cong. Rec. 1444 (1945).)

See also the legislative history quoted at pages 32-35 of Petitioners' Main Brief.

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* Senator Pepper, like respondents here, argued that such an exemption went too far, adding: "As a practical matter, we know that the States cannot and will not enforce these laws against insurance companies." But Congress rejected that view, enacting Section 2(b) without revision.

Finally, the contemporaneous interpretation of the Act confirms that prohibitory legislation, like Rhode Island's, was sufficient to render the Sherman Act inapplicable to the business of insurance—and that the exemption was not limited to cases where the states specifically authorized the conduct. During the moratorium period provided by Congress virtually every state, including Rhode Island, passed some version of the "Model Unfair Trade Practices Bill for Insurance," which prohibits unfair and anticompetitive practices in the business of insurance, on the understanding that such statutes were state regulation within the meaning of the McCarran-Ferguson Act. *See FTC* v. *National Casualty Co.*, 357 U.S. 560, 564 n. 6 (1968). The preamble to the Rhode Island statute specifically states that the purpose of the statute "is to regulate trade practices in the business of insurance in accordance with the intent of congress as expressed in the act of congress of March 9, 1945 (Public Law 15, 79th Congress) [The McCarran-Ferguson Act] ...." (R. I, Gen. Laws §27-29-1, A. 92.) An interpretation of the boycott exception which would withdraw the Sherman Act exemption from conduct regulated—but not specifically authorized by the states—would thus be contrary to the understanding held by state legislatures and everyone else for more than thirty years.

Thus, the McCarran-Ferguson exemption withdraws the Sherman Act from the business of insurance whenever the states have undertaken to regulate it; no showing of inconsistency between the Sherman Act and state regulation is needed to invoke the exemption. Accordingly, cases such as *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945), have no bearing here. That case involved a rate fixing conspiracy by railroads which were regulated under the Inter-

state Commerce Act. The railroads sought to *imply* an antitrust exemption for such conduct from the ICC's authority to regulate rates. This Court specifically noted that the only antitrust exemption provided by the Interstate Commerce Act at the time of decision related to mergers and acquisitions approved by the ICC and that the Act did not give the ICC comparable authority to exempt rate fixing combinations.* (324 U.S. at 456-57.) In these circumstances, the Court held that an antitrust exemption could not be *implied* unless there was a conflict between the antitrust laws and the ICC's authority to regulate rates. Here, however, petitioners are not relying on an implied exemption but on an express statutory exemption which withdraws the application of the Sherman Act where the states have regulated the business of insurance.**

The McCarran-Ferguson Act, moreover, contrasts with other statutory exemptions from the federal antitrust laws which expressly limit immunity to "transaction[s] approved or authorized" by a designated regulatory agency. (*See, e.g.*, Interstate Commerce Act, 49 U.S.C. §5(12).) Had Congress wished to impose such a limitation on the McCarran-Ferguson antitrust exemption, it could easily have done so. Instead—unlike any other federal antitrust exemption—Congress conditioned the McCarran-Ferguson exemption on the existence of "regulation" alone.

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* Such authority was later granted in the Act of June 17, 1948, three years after this Court's decision in Georgia v. Pennsylvania R. Co. *See* 49 U.S.C. §5b.

** Respondents note that Rhode Island regulates a great number of industries other than the insurance business, and that none of these other industries are, by virtue of such regulation, exempt from antitrust laws. (Respondents' Br. at 39 and Br. App. A.) Petitioners agree. But unlike these other industries, Congress singled out the business of insurance and provided it with an express antitrust exemption where the states regulate it.

While a showing of conflict between the Sherman Act and state regulation is thus irrelevant to the application of the express McCarran-Ferguson antitrust exemption, it is worth noting that the First Circuit's expansive interpretation of the boycott exception—by applying the Sherman Act to all joint activities affecting the terms of insurance—does threaten to undermine state systems of regulation, including Rhode Island's.

First, even where state regulation merely parallels the Sherman Act, there is a real potential for conflict. This point was made by the State Attorneys General who appeared as amici in support of respondents in *FTC* v. *National Casualty, Co.*, 357 U.S. 560 (1958). There, state laws regulating deceptive practices covered the same ground as the FTC Act. But as the Attorneys Generals' brief states:

"[M]ost of the state laws . . . are couched in broad terms and are enforceable initially through administrative interpretation and application. In dealing with concepts as indefinite as 'unfair methods of competition,' or 'unfair or deceptive acts or practices,' . . . disagreements between state and federal administrative authorities would of course be inescapable . . . . Similar conflicts between state and federal interpretations would be inevitable. As this Court said in *Garner* v. *Teamsters, Chauffeurs and Helpers, etc.*, 346 U.S. 485, 490-491 (1953): 'A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.'"

* * *

". . . Presumably the only instance in which the [Federal Government] would lack jurisdiction would be when a state held a hearing and concluded that the

> [conduct] was proper and the complaint should be dismissed. If the state entered its order first, the Commission could enter an identical one. But if the Commission's order came first, the states could no longer exercise their independent judgment. Perhaps they could enter an identical order. But they could not disagree in any respect on either the merits or the relief to be directed. This is the very kind of supersession of state regulation which the Commission elsewhere in its brief concedes is not permitted by the McCarran Act." (Brief to the Attorney General of the State of Michigan at 26-28, *FTC* v. *National Casualty Co.*, 357 U.S. 560 (1958).)

The dangers of conflict with the state regulatory scheme are even more pronounced where, as here, a private class action antitrust suit is involved. An expansive interpretation of the boycott exception may encourage policyholders to use the bludgeon of federal antitrust class action litigation as a device for obtaining solutions to grievances about the terms and availability of insurance heretofore left to state insurance regulatory agencies. Most antitrust class actions are resolved by way of settlement. But private settlements of controversies involving the terms of insurance contracts issued to an entire class of policyholders, run counter to a system of state regulation of insurance.* Even if federal courts, in approving such settlements, consider whether they were consistent with the state regulatory scheme, the federal courts' judgment about state insurance regulatory policy would be substituted for the judgment of the state insurance departments, contrary to the purposes of the McCarran-Ferguson Act.

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* *See* Note, Developments in the Law—Class Actions, 89 Harv. L. Rev. 1373-74, 1378, 1536 (1976).

Finally, the First Circuit's expansive interpretation of the boycott exception also threatens to create conflicts with state-authorized insurance activity because, as noted, if conduct amounts to a boycott even state authorization cannot bring the McCarran-Ferguson exemption into play.

Indeed, respondents themselves argue that under their definition of "boycott" state-authorized insurance activities such as "pools or other joint insurance mechanisms" and "refusals to deal on the basis of uniform risk classifications" would lose the protection of the McCarran-Ferguson Act and be subject to a rule of reason analysis. (Respondents' Br. at 46-47.) As a result, the reasonableness of state-authorized insurance activity, heretofore considered protected by the McCarran-Ferguson exemption, would now be tested by federal courts under the standards of the Sherman Act and could be the subject of protracted federal antitrust litigation.

In sum, by failing to draw any meaningful line between boycotts and other joint activity covered by the Sherman Act, the First Circuit interpretation of the boycott exception subverts the entire purpose of the McCarran-Ferguson Act. Respondents and the Government, like the First Circuit, are mistaken in asserting that this result is required by the plain meaning of the phrase "boycott, coercion, or intimidation," as an analysis of the very cases they cite discloses.

III

There is no precedent for the First Circuit's broad definition of boycott.

Respondents and the Government, like the First Circuit, maintain that the broad reading of the boycott exception is compelled by common usage of the term boycott in cases under the Sherman Act, and by the absence of any evidence of Congressional intention to use the term more narrowly in the McCarran-Ferguson Act. In our main brief we showed that this Court has consistently applied the term boycott, in Sherman Act cases, to concerted refusals to deal used to exclude competitors or to restrict the competitive practices of the target, and that, accordingly, the plain meaning of the boycott exception does not warrant the First Circuit's broad interpretation. (Petitioners' Main Brief at 21-30.) The cases cited by respondents and the Government support our position.*

Thus, respondents and the Government point to language in *United States* v. *South-Eastern Underwriters Ass'n,* 322 U.S. at 535-36, and 562, which refers to boycotts of consumers and refusals to sell to consumers. (Respondents' Br. at 9-11; Gov't Br. at 11.) But that case did not involve a mere concerted refusal to sell to consumers; the concerted refusals to sell to consumers in that case were specifically described as the means used to ex-

* Respondents argue at length that Congress intended Section 3(b) of the McCarran-Ferguson Act to apply to any "boycott" and that the language of Section 3(b) expressly refers to *any* act or agreement of "boycott, coercion, or intimidation." But this begs the real question as to what the term "boycott", as opposed to other joint activities normally proscribed by the Sherman Act, really means.

clude competing companies and agents which were not members of the Association from the business of insurance and to compel member insurance companies and agents to sell insurance at the prices fixed by the conspirators. The concerted refusals to deal were aimed at consumers who dealt with non-member or non-conforming companies and agents, in order to put pressure upon those companies and agents. *United States* v. *South-Eastern Underwriters' Assn.,* 322 U.S. at 535-36. In its brief in *South-Eastern Underwriters,* the Government explained that the defendants were charged "with conspiring to monopolize the fire insurance business and, specifically, with conduct to force out of business companies not members of their association" and that to that end "insurance companies . . . refuse[d] to furnish insurance to persons who failed to deal with them exclusively. . . ." (Brief for the United States at 33, 66, ***United States*** v. *South-Eastern Underwriters' Association,* ***supra.***) Similar attempts to force competitors from the market, or to restrain the competitive practices of a target, were involved in every other case cited by respondents in which a boycott was held to exist. Thus:

In *Fashion Originators' Guild of America, Inc.* v. *FTC,* 312 U.S. 457 (1941) (Respondents' Br. at 11; Gov't Br. at 21-22), conspiring dress manufacturers refused to sell to retailers that dealt with style pirates, in order to exclude the style pirates from competition.

In *United States* v. *Frankfort Distilleries, Inc.,* 324 U.S. 293 (1945) (Respondents' Br. at 11-13), producers and wholesale distributors of liquor refused to sell to retail dealers unless they agreed to refrain from dealing with competitors of the defendants which refused to be bound

by defendants' price fixing agreements. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951) (Respondents' Br. at 11), involved concerted refusals by manufacturers to deal with wholesalers in order to compel wholesalers to resell at prices fixed by the manufacturers.

In *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (Respondents' Br. at 4, 13, 45; Gov't Br. 22), Broadway-Hale induced manufacturers to engage in a concerted refusal to sell to its competitor, Klor's, in order to exclude Klor's from competition.

Radiant Burners, Inc. v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (Respondents' Br. at 10; Gov't Br. at 22), involved an alleged attempt by gas burner manufacturers to deny a competing manufacturer a seal of approval needed to make its product marketable, so as to exclude that manufacturer from competition.

Federal Maritime Commission v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968) (Respondents' Br. at 10 n. 4; Gov't Br. at 11), involved a refusal by members of a shipping conference to deal with steamship passengers who wished to purchase tickets from non-conference steamship lines in order to exclude the non-conference lines from competition.

Washington State Bowling Proprietors Association v. *Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir.), *cert. denied* 384 U.S. 963 (1966) (Respondents' Br. at 9), involved a concerted refusal by bowling alleys who were members of the Association to allow bowlers who patronized competing non-member bowling alleys to participate in Association

tournaments. The plaintiffs, non-member bowling alleys, claimed that this conduct excluded them from competition with the conspiring members of the Association.

While these cases simply exemplify the distinction between boycotts and other concerted refusals to deal which we maintain is reflected in this Court's decisions, other cases noted by respondents and the Government explicitly draw the same distinction. *Worthen Bank & Trust Co.* v. *National BankAmericard Inc.*, 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974) (Respondents' Br. at 9), is such a case. There, suit was brought against a membership corporation comprised of banks entitled to issue credit cards bearing the BankAmericard name and to extend credit to holders of such cards. Plaintiff, a non-member bank, challenged a by-law of the corporation that barred banks belonging to other credit card organizations from issuing defendant's own cards or extending credit to its cardholders. The District Court held the membership corporation to be a "horizontal combination of competitors" and held enforcement of the by-law to be a "group boycott." (485 F.2d at 124.) The Court of Appeals reversed.

Relying on this Court's decision in *Associated Press* v. *United States*, 326 U.S. 1 (1945), the Court of Appeals expressly rejected the contention that all concerted refusals to deal constitute group boycotts. There, the Eighth Circuit observed:

> "... The [Supreme] Court, in group boycott language, struck down the bylaws of A.P. which restricted membership solely because the applicant was a competitor of an existing member. *With regard to the other bylaw, however, forbidding A.P. members to sell local*

news to non-members, an excellent example of a concerted refusal to deal, the Supreme Court did not strike down that prohibition. Id. at 21-22, 65 S.Ct. 1416." (485 F.2d at 128.) (Emphasis supplied.)

Group boycotts, said the Court, "generally involve either:

"1. horizontal combinations among trades to exclude direct competitors from the market. *See e.g., Eastern States Retail Lumber Dealers' Assn.* v. *United States,* 234 U.S. 600, 34 S. Ct. 951, 58 L.Ed. 1490 (1914), or,

"2. vertical combinations to exclude competitors of some of the members of the combination. *See e.g., Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed. 2d 741 (1959), or,

"3. combinations designed to influence the trade practices of boycott victims rather than eliminate them as competitors. *See, e.g., Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission, supra,* 312 U.S. at 457, 61 S.Ct. 703, 85 L.Ed. 949." (485 F.2d at 124.)

Thus, far from supporting respondents' position that all refusals to deal are boycotts, *Worthen* squarely rejected it.

Union Circulation Co. v. *FTC,* 241 F.2d 652 (2d Cir. 1957) (Gov't Br. at 22) is to the same effect.

There, the FTC challenged the legality of certain "no switching" agreements pursuant to which magazine distributors agreed not to hire salesmen who had been employed by any other distributor during the preceding year. Like respondents here, the FTC alleged that these agreements—which deprived its targets of the ability to carry

on their trade—constituted a group boycott. The Court of Appeals disagreed. Distinguishing such cases as *Fashion Originators Guild of America* v. *FTC,* 312 U.S. 457 (1941), the Court held that

> "[t]he restraints here under consideration, the 'no-switching' agreements, are dissimilar in several significant respects to the group boycotts that have been held illegal *per se* by the Supreme Court. The 'no-switching' agreements are directed at the regulation of hiring practices and the supervision of employee conduct, not at the control of manufacturing or merchandising practices. These agreements are not designed to coerce retailers, or other independent members of an industry, into abandoning competitive practices of which the concerted parties do not approve." (241 F.2d at 657.)*

Respondents assert that the District of Columbia Circuit, in *Proctor* v. *State Farm Mutual Automobile Insurance Co.,* 561 F.2d 262 (D.C. Cir.), *petition for cert. filed,* No. 77-580, 46 U.S.L.W. 3294 (U.S. Oct. 19, 1977), held that a conspiracy to refuse to pay more than a fixed price for automobile repairs "fell within the boycott exception." (Respondents' Br. at 38.) In fact, the Court found precisely the opposite, holding the McCarran-Ferguson Act to immunize the conduct complained of from the federal antitrust laws.

Proctor stands for the proposition that a horizontal conspiracy cannot be converted into a boycott merely by char-

* In *Worthen* and *Union Circulation,* the determination that there was no group boycott left open the question of whether the conduct complained of constituted an unreasonable restrain of trade otherwise in violation of Section 1 of the Sherman Act. Here any such inquiry is foreclosed—not because the scope of the Sherman Act should in any way be narrowed, or because the Sherman Act is unavailable to to consumers—but because the McCarran-Ferguson Act renders the Sherman Act applicable to the business of insurance only to the extent that boycotts are alleged. Here, there is no boycott.

acterizing it as a refusal to deal except at terms fixed by the conspiracy. It holds that a boycott requires some additional conduct aimed at penalizing the target, or those who deal with it, in order to force the target to conform its competitive practices to those dictated by the conspirators.

Respondents themselves acknowledge that a boycott is "an enforcement mechanism" (Respondents' Br. at 12); a means of "carry[ing] out" an "agreement in restraint of trade" (Respondents' Br. at 22). Respondents characterize the conduct alleged in the complaint as "a boycott to enforce a horizontal agreement not to compete." (Respondents' Br. at 12.) But the alleged agreement not to compete is indistinguishable from the alleged concerted refusal to sell to St. Paul's customers; indeed, these are just two different ways of characterizing the same conduct. There is no claim that any separate conduct was undertaken to compel adherence to the agreement not to compete.

The same considerations which preclude the conduct alleged here from being classified as a boycott also preclude it from being brought within the "boycott" exception to the McCarran-Ferguson Act under the rubric of "coercion or intimidation."

Every "restraint of trade" which violates the Sherman Act necessarily restricts the economic freedom of some parties and thus could be said to involve "coercion." But every Sherman Act violation could not involve "coercion" within the meaning of the exception to the McCarran-Ferguson Act for otherwise the Sherman Act exemption would be meaningless.

The phrase "coercion or intimidation" was used in *United States* v. *South-Eastern Underwriters* 322 U.S. at 535-36, to describe the whole panoply of activities used by

the conspirators to exclude competitors or penalize them for failure to conform their competitive practices to those dictated by the conspiracy. These activities included blacklists and disparagement, as well as concerted denials of products or services to those who would not conform or to persons dealing with them.

The legislative history shows that Congress was using the phrase to apply to such enforcement activities.

> "Mr. Celler. . . . There is, properly, proscribed in the wording of the pending bills acts 'of boycott, coercion, or intimidation.' . . . The Senate version, however, had in addition to 'any act of boycott, coercion or intimidation' the word 'agreement' to boycott, coerce, or intimidate.
>
> "What is the danger in leaving that word out? There is a great deal of danger. These great companies can issue a blacklist. It need not be in writing, there need not be a so-called overt act, it could be an oral blacklist, and they would frighten the wits out of all these small companies. In addition there could be an 'agreement' for what is known as separation. Let me tell you something about the 'separation.' Under 'separation,' if an agent wrote insurance for an outside or marked or proscribed company, or a blacklisted company, he was immediately stripped of his privileges; that is to say, he was not permitted to write insurance for any of the members of the self-constituted governing organizations known as boards. If a member of any of the boards wrote business through that agent which represented independent or nonmember companies, such member company was subject to punishment and was compelled to give up the business. . . ." (91 Cong. Rec. 1087 (1945).)

Senator O'Mahoney similarly used the phrase to apply to such enforcement activities. Thus he explained:

> "The Insurance Executives Association undertook by regulation to coerce, intimidate, and boycott its own members and compel them to obey the rules and regulations the association itself prescribed." (91 Cong. Rec. 1486 (1945).)

Senator O'Mahoney then gave an example of conduct constituting "boycott, coercion, or intimidation" by reading from the rules of the Association:

> "Whenever the trustees by a vote of two-thirds of their membership shall decide that any member has been guilty of unfair or unethical conduct involving violation or evasion of the rules or principles herein outlined, they shall impose upon such member any penalty they may believe to be most appropriate and fitting, including expulsion from membership, or they may refer their finding to the territorial or special organization having jurisdiction for the imposition of a proper penalty. . . .
>
> "In addition to or in lieu of a fine the board of trustees may require that the offending member shall retire from risks or agencies involved for such period as the board of trustees may decide upon and/or that such member shall make adequate restitution when possible to the member or members who may have been injured by the unfair or unethical act of the offending member." (*Id.*)

This, Senator O'Mahoney concluded,

> ". . . is the record of one agreement to coerce and intimidate persons engaged in the insurance business." (*Id.*)

Here there are no enforcement activities to compel anyone to adhere to the terms of the horizontal agreement alleged. There is nothing more than the allegation of the horizontal agreement itself. Hence there is nothing that can be characterized as "boycott, coercion, or intimidation."

Conclusion

The cases and the legislative history provide the basis for drawing a reasonable line which distinguishes between conduct covered by the boycott exception in Section 3(b) of the McCarran-Ferguson Act and conduct exempted from the Sherman Act under Section 2(b). The First Circuit's interpretation of the boycott exception erases that distinction without justification and without providing an alternative boundary which would give meaning to the entire Act. The judgment of the First Circuit should be reversed.

Respectfully submitted,

SIDNEY S. ROSDEITCHER
HOWARD S. VEISZ
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10022

THOMAS D. GIDLEY
STEPHEN J. CARLOTTI
HINCKLEY, ALLEN,
SALISBURY & PARSONS
2200 Industrial Bank Building
Providence, Rhode Island 02903

Attorneys for The
Aetna Casualty and Surety Company

CHARLES LISTER
JONATHAN M. WEISGALL
COVINGTON & BURLING
888 16th Street, N. W.
Washington, D. C. 20006

JOSEPH A. KELLY
CARROLL, KELLY & MURPHY
326 Industrial Bank Building
Providence, Rhode Island 02903

Attorneys for
Hartford Casualty Company and
Hartford Fire Insurance Company

WALKER B. COMEGYS
MARION K. LITTMAN
POWERS & HALL
30 Federal Street
Boston, Massachusetts 02110

KIRK HANSON
HANSON, CURRAN & PARKS
1210 Turks Head Building
Providence, Rhode Island 02903

Attorneys for
St. Paul Fire & Marine
Insurance Company

JOSEPH V. CAVANAGH
HIGGINS, CAVANAGH & COONEY
600 Turks Head Building
Providence, Rhode Island 02903

Attorneys for
Travelers Insurance Company

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In the Supreme Court of the United States

OCTOBER TERM, 1977

ST. PAUL FIRE & MARINE INSURANCE CO., ET AL.,
PETITIONERS

v.

DAVID M. BARRY, M.D., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. McCREE, JR.,
Solicitor General,
JOHN H. SHENEFIELD,
Assistant Attorney General,
DANIEL M. FRIEDMAN,
Deputy Solicitor General,
RICHARD A. ALLEN,
Assistant to the Solicitor General,
JOHN J. POWERS, III,
WILLIAM D. COSTON,
Department of Justice,
Washington, D.C. 20530.

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INTEREST OF THE UNITED STATES

The United States has the primary responsibility for enforcing the antitrust laws. It is concerned that statutes creating exemptions from those laws not be interpreted more broadly than is necessary to effectuate the congressional purpose in providing those exemptions. In addition, the extent to which the antitrust laws apply to the insurance industry is a matter of considerable importance to the United States in determining whether to act against anticompetitive conduct by insurance companies.

QUESTIONS PRESENTED

The McCarran-Ferguson Act makes the antitrust laws applicable to the business of insurance only "to the extent that such business is not regulated by State Law" (15 U.S.C. 1012(b)). It provides, however, that nothing in that Act "shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation" (15 U.S.C. 1013(b)). The United States will discuss the following questions:

1. Whether the Sherman Act applies to all boycotts, coercion, or intimidation by insurance companies rather than, as petitioners contend, only to such practices when directed against members of the insurance industry.

2. Whether the only boycotts by the insurance industry to which the Sherman Act applies are those directed against competitors of the boycotter.

STATUTES INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *.

The McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U.S.C. 1011–1015, provides in pertinent part:

[Section 1] Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States. [15 U.S.C. 1011.]

[Section 2] (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the * * * Sherman Act, and the * * * Clayton Act, and * * * the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law. [15 U.S.C. 1012.]

[Section 3(b)] Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation. [15 U.S.C. 1013(b).]

STATEMENT

Respondents, physicians and patients in Rhode Island, filed this civil antitrust suit in the United States District Court for the District of Rhode Island, on behalf of Rhode Island physicians and their patients, against the four petitioner insurance companies, who sold medical malpractice insurance in that state (Pet. App. 38a–42a). The complaint made the following allegations:

Petitioners conspired "to deny any medical malpractice insurance coverage on an 'Occurrence Basis' to all of the physicians insured with defendant, St. Paul" in April 1975 (¶ 30, Pet. App. 47a), and "to deny any medical malpractice insurance coverage on any basis to certain hospitals insured with defendant, St. Paul, at said time" (¶ 31, Pet. App. 47a). An "occurrence" basis policy covers claims arising out of acts done during the term of the policy, even when the claim is made after the policy has expired; a "claims made" policy covers only claims asserted while the policy is in force (¶¶ 24, 27, Pet. App. 46a).

In April 1975, petitioner St. Paul Fire & Marine Insurance Co. ("St. Paul") announced that it would not renew medical malpractice coverage on an "occurrence" basis, but would issue coverage only on a "claims made" basis (¶ 28, Pet. App. 46a–47a). Following St. Paul's announcement and in furtherance of the conspiracy, petitioners Aetna Casualty & Surety Co., Travelers Indemnity of Rhode Island (and two affiliated Travelers Companies) and Hartford Casualty Company (and an affiliated Hartford Company) (¶¶ 4, 5, 6, Pet. App. 40a–41a) have refused to accept applications for medical malpractice insurance from physicians, hospitals or other medical personnel whom St. Paul then insured (¶ 32, Pet. App. 47a–48a). Petitioners "engaged in a purposeful course of coercion, intimidation, boycott and unfair competition with respect to the sale of medical malpractice insurance in the State of Rhode Island" (¶ 35, Pet. App. 48a).

The district court dismissed the complaint, ruling that the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U.S.C. 1011–1015, immunized the insurance companies from antitrust liability in this case (Pet. App. 26a–37a). It held that the conduct charged in the complaint involved the "business of insurance" (*id.* at 29a) and that the state regulated that business (*id.* at 29a–30a). The court ruled that the McCarran-Ferguson Act barred this suit unless the conduct charged came within Section 3(b) of that Act, 15 U.S.C. 1013(b), exempting from the Act agreements or acts of boycott, coercion, or intimidation (*id.* at 31a). Observing that, although "on first glance" this provision covered the plaintiffs' claims (*ibid.*), the court applied decisions that limited Section 3(b) to combinations that "blacklist" insurance agents or insurance companies (*id.* at 31a–32a).

A divided court of appeals reversed (*id.* at 1a–21a). The court rejected those decisions limiting Section 3(b) to the insurance industry (*id.* at 6a–7a). It stated that the language of Section 3(b) is neither

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ambiguous nor senseless (*id.* at 7a), but its clear terms authorize an antitrust suit against an insurance company by anyone, including consumers, victimized by any boycott, coercion, or intimidation that the Sherman Act prohibits (*id.* at 7a–8a). The court noted that permitting consumers to litigate those specific antitrust violations will not "hamstring" state regulatory bodies (*id.* at 9a–10a), but will advance the national policy in favor of competition (*id.* at 10a–11a).

The court then examined the legislative history of the Act "in deference to the courts which have found support in that history" (*id.* at 12a). After a thorough analysis of the legislative history of Section 3(b) (*id.* at 6a–7a, 12a–18a), the court concluded that there is no evidence in that history that "would justify our reading the boycott provision in the special [blacklist] way" the insurance companies urged (*id.* at 18a).

SUMMARY OF ARGUMENT

I

A. The language and purpose of the McCarran-Ferguson Act show that Section 3(b) of that Act, which continues the applicability of the Sherman Act to boycotts, coercion, or intimidation by members of the insurance industry, is not limited to those practices when they are directed against members of the industry. It also includes boycotts, coercion, or intimidation directed against policyholders.

The language of Section 3(b) is broad and unqualified: it covers "any" boycott, coercion, or intimidation. If Congress had intended to limit the scope of Section 3(b) as petitioners contend, it presumably would have said so. The language apparently derives from *United States* v. *South-Eastern Underwriters Association,* 322 U.S. 533, where the Court used those words in describing the indictment and in explaining why application of the Sherman Act to such practices would not destroy state regulation of the insurance business. In *South-Eastern Underwriters,* the insurance companies' condemned practices were directed against both "competitors and consumers" (322 U.S. at 562); when Congress used the same language in Section 3(b), it intended the words to have the same scope.

Application of the Sherman Act to insurance company boycotts, coercion, or intimidation directed against policyholders would not interfere with state regulation of the insurance industry, which the McCarran-Ferguson Act was intended to preserve.

B. The legislative history of the McCarran-Ferguson Act confirms that Congress intended Section 3(b) to cover all boycotts, coercion, or intimidation by the insurance industry. Although that history shows that Congress was concerned with industry "blacklisting" of agents and companies, the court of appeals correctly noted that it contains "no suggestion that the legislation was limited to th[e] evil * * * of insurance company self-government outside the law" (Pet.

App. 17a). To the contrary, the history shows that Congress intended to continue the application of the Sherman Act to all boycotts, coercion, or intimidation.

II

The conduct charged in respondents' complaint constituted a "boycott" under both Section 1 of the Sherman Act and the McCarran-Ferguson Act. A boycott under the Sherman Act is not limited to action directed against competitors, but covers any concerted refusal to deal. This Court repeatedly has condemned as an illegal boycott a concerted refusal by manufacturers and distributors to deal with retail outlets. See, *e.g., Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U.S. 457; *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207.

Respondents' complaint charged a boycott under these principles. It alleged that three of the petitioner insurance companies concertedly refused "to accept any applications for medical malpractice insurance of any type from any physicians, hospitals or other medical personnel presently insured by defendant, St. Paul" (¶ 32, Pet. App. 47a–48a). The charge was not just a refusal to deal on certain terms, but a refusal to deal at all. It is a classic example of a boycott that the Sherman Act condemns. There is therefore no occasion in this case to determine the precise contours of what constitutes a boycott under either the Sherman Act or the McCarran-Ferguson Act.

ARGUMENT

I

THE MC CARRAN-FERGUSON ACT'S PROVISION MAKING THE SHERMAN ACT APPLICABLE TO ANY BOYCOTT, COERCION, OR INTIMIDATION BY THE INSURANCE INDUSTRY COVERS SUCH PRACTICES WHEN DIRECTED AGAINST PERSONS OUTSIDE THAT INDUSTRY

A. THE LANGUAGE AND PURPOSE OF THE ACT COVER ALL BOYCOTTS, COERCION, OR INTIMIDATION, AND DO NOT SANCTION THOSE PRACTICES WHEN DIRECTED OUTSIDE THE INSURANCE INDUSTRY

1. Section2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b), exempts the insurance business from the antitrust laws except "to the extent that such business is not regulated by State law." Section 3(b) of that Act, however, provides:

> Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Nothing in this broad language indicates, or even suggests, that Congress did not thereby intend to continue in effect the Sherman Act's well settled prohibition of all restraints of trade involving boycott, coercion, or intimidation. The language is sweeping: the Sherman Act remains applicable to "any" agreement to boycott, coerce, or intimidate, or to "any" of those acts themselves. "[G]roup boycotts"—which is one of the charges here—are among those "agreements or practices which because of their pernicious effect on

competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use" (*Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 5).

If Congress had intended to permit the insurance industry to engage in those pernicious practices against persons outside the industry without incurring Sherman Act liability, and had intended to prohibit those practices only when directed against members of the industry, presumably it would have made that intention explicit. Instead, it used the broadest possible language: the Sherman Act continues to cover "any" boycott, coercion, or intimidation. The language of Section 3(b) of the McCarran-Ferguson Act gives no hint that Congress intended the coverage of the Sherman Act in its applicability to these practices to be any less comprehensive because the particular restraints are imposed by insurance companies. Cf. *Pfizer, Inc.* v. *Government of India,* No. 76–749, decided January 11, 1978, slip op. 4.

As the court of appeals noted (Pet. App. 16a–17a), the phrase "boycott, coercion, or intimidation" in Section 3(b) apparently stemmed from this Court's opinion in *United States* v. *South-Eastern Underwriters Association,* 322 U.S. 533. There the Court stated that the indictment charged, among other things, that insurance companies "employed boycotts together with other types of coercion and intimidation to force

non-member insurance companies into the conspiracy, and to compel persons who needed insurance to buy only from S.E.U.A. members on S.E.U.A. terms" (322 U.S. at 535). In rejecting the claim that applying the Sherman Act to the insurance business would destroy much state regulation of that business (*id.* at 561), the Court stated (*id.* at 562; footnote omitted):

> No states authorize combinations of insurance companies to coerce, intimidate, and boycott competitors and consumers in the manner here alleged, and it cannot be that any companies have acquired a vested right to engage in such destructive business practices.

South-Eastern Underwriters was a case in which the insurance companies' boycotts, coercion and intimidation were directed against both "competitors and consumers." When Congress in Section 3(b) of the McCarran-Ferguson Act continued the applicability of the Sherman Act to "such destructive business practices," it intended to cover those practices when directed against consumers as well as against competitors.

"[E]xemptions from antitrust laws are strictly construed" (*Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 733). The McCarran-Ferguson Act is such an exemption. Section 3(b) of that Act, which limits the exemption, should not be construed to give the McCarran-Ferguson antitrust exemption a broader scope than Congress intended. Cf. *Maryland and Virginia Milk Producers Association, Inc.* v. *United States,* 362 U.S. 458, 464–467.

2. The basic purpose of the McCarran-Ferguson Act was to remove doubts, created by the decision in *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533, concerning the constitutional power of the states to tax and to regulate insurance, and to insure that state regulation could be continued. See S. Rep. No. 20, 79th Cong., 1st Sess. 1–2 (1945); H.R. Rep. No. 143, 79th Cong., 1st Sess. (1945). Legislators supporting the bill emphasized this purpose of restoring and protecting state jurisdiction over insurance.[1]

Section 1 of the McCarran-Ferguson Act, 15 U.S.C. 1011, declares that "the continued regulation and taxation by the several States of the business of insurance is in the public interest." Section 2 accomplishes this purpose by withdrawing federal authority to regulate the competitive practices of the industry "in those States which are regulating those practices under their own laws" (*Federal Trade Commission* v. *National Casualty Co.*, 357 U.S. 560, 563). Congress, however, also recognized that continuing the applicability of the Sherman Act to boycotts, coercion and intimidation would not interfere with or handicap the effective state regulation of insurance which it was feared the *South-Eastern Underwriters* decision might have jeopardized.

As the court of appeals correctly stated in this case (Pet. App. 9a), "[n]or would the introduction of anti-

[1] *E.g.*, 91 Cong. Rec. 1087 (1945) (remarks of Rep. Hancock); 91 Cong. Rec. 1090–1091 (1945) (remarks of Rep. Gwynne); 91 Cong. Rec. 1092 (1945) (remarks of Rep. Springer).

trust principles into dealings between policyholders and insurers hamstring the state regulatory bodies that have primary responsibility for overseeing the nation's insurance business." It is difficult to see why the States' regulatory interest would preclude application of the Sherman Act to boycotts, coercion or intimidation against policyholders, who are not subject to direct state regulation, but not against members of the insurance industry itself, which is subject to such regulation.

Thus, the court of appeals' interpretation of Section 3(b) would not emasculate the States' authority effectively to regulate the business of insurance, which the McCarran-Ferguson Act was designed to preserve. Nor, contrary to the concern of *amici curiae* American Insurance Association, the Alliance of American Insurers and the National Association of Independent Insurers (Br. 3–26), would it disrupt the concerted activities in which the insurance industry now engages pursuant to state regulation.[2]

[2] *Amici* cite a Justice Department Report to support their prediction of increased antitrust liability for insurance companies (*id.* at 22–23, citing *The Pricing and Marketing of Insurance*, Report of the U.S. Department of Justice to the Task Group on Antitrust Immunities, p. 170, (January 1977). However, that report, which generally recommended the wide-spread application of antitrust principles to the insurance industry, acknowledged that many concerted activities described in the *amici* brief could continue even if the McCarran-Ferguson Act antitrust exemption were repealed (Report, pp. vii–viii):

"Antitrust precedent indicates that insurance companies could pool their loss experience through a statistical bureau consistent with federal antitrust standards. Moreover, the federal antitrust

Moreover, our view that Section 3(b) means what it says—that it covers "any" boycott, coercion or intimidation—furthers what the court of appeals correctly recognized to be "[a] primary aim of the antitrust law * * * assuring consumers the benefits of a free market economy" (Pet. App. 10a). Respondents' complaint alleges that, as a result of petitioners' boycott, coercion and intimidation, "the physicians of Rhode Island insured by defendant, St. Paul, have been placed in the position where they are unable to obtain medical malpractice insurance on a reasonable basis after June 30, 1975" (¶ 36, Pet. App. 49a); and that "plaintiff patients will be forced to incur expenses for medical services and hospitalization far in excess of what they should be charged in the absence of" petitioners' violations of the antitrust laws (¶ 18, Pet. App. 59a).

B. THE LEGISLATIVE HISTORY OF THE McCARRAN-FERGUSON ACT CONFIRMS THAT SECTION 3(b) CONTINUES THE APPLICABILITY OF THE SHERMAN ACT TO ALL BOYCOTTS, COERCION, OR INTIMIDATION BY THE INSURANCE INDUSTRY

The legislative history of the McCarran-Ferguson Act confirms that the broad language of Section 3(b) continues the applicability of the Sherman Act to all

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laws would not prohibit any necessary trending of future losses on a composite basis by advisory organizations that were independent of the companies they were serving. Likewise, the antitrust laws would not prohibit those voluntary risk-sharing arrangements, such as insurance pools and reinsurance agreements, that were either necessary to the conduct of business or served some other legitimate business purpose without substantially lessening competition."

boycotts, coercion or intimidation by the insurance industry, and is not limited to only those of such practices that are directed against members of the industry. There are indications in the legislative history that Congress was concerned with industry "blacklisting" of agents and companies. But in its totality that history shows that the legislature intended Section 3(b) to have the broad scope we urge. It contains "no suggestion that the legislation was limited to th[e] evil * * * of insurance company self-government outside the law" (Pet. App. 17a). Accord, *Proctor* v. *State Farm Mutual,* 561 F. 2d 262, 271–274 (C.A.D.C.), petition for a writ of certiorari pending, No. 77–580.

1. The bill that became the McCarran-Ferguson Act originated in the Senate (S. 340, 79th Cong., 1st Sess. (1945)). The Senate Committee Report on the bill described the boycott, coercion, and intimidation provision of the initial draft (S. Rep. No. 20, 79th Cong., 1st Sess. 3 (1945)) as follows:

> Section 4 * * * (*b*) provides that at no time are the prohibitions in the Sherman Act against any agreement or act of boycott, coercion, or intimidation, suspended. These provisions of the Sherman Act remain in full force and effect.

The House Report used the identical language. H.R. Rep. No. 143, 79th Cong., 1st Sess. 3 (1945). These reports show that Congress intended "the prohibitions in the Sherman Act" against "any" boycott, coercion, or intimidation by insurance companies to "remain in full force and effect."

Statements made during the Senate debate similarly indicate the unlimited scope of Section 3(b). Asked whether the Act would sanction attempts to monopolize, Senator Ferguson replied: "No. * * * [I]f agreements in restraint of trade or to monopolize amounted either to a boycott and/or coercion and/or intimidation, they would be absolutely void * * *." 91 Cong. Rec. 480 (1945). Subsequently, Senators McCarran and Ferguson discussed the scope of Section 3(b) (91 Cong. Rec. 1443 (1945); emphasis added):

> Mr. FERGUSON. I believe that a statement as to the fair construction of the act would add to the helpfulness of what the Senator from Nevada has said. There are certain things which a State cannot interfere with. It cannot interfere with the application of the Sherman Act to *any* agreement to boycott, coerce, or intimidate, or act of boycotting, coercion, or intimidation.
>
> Mr. MCCARRAN. Not at any time.
>
> Mr. FERGUSON. Not at any time.
>
> Mr. MCCARRAN. Nor is the control of those matters under the specified antitrust acts removed at any time.

Near the end of the debate, Senator Barkley inquired if the boycott, coercion, or intimidation provision would permit states to sanction any "combinations which might be regarded as violative of the Sherman or Clayton Acts." 91 Cong. Rec. 1486 (1945). Senator O'Mahoney, one of the Senate conferrees on the bill *id.* at 1208), responded (*id.* at 1486):

> No; my judgment is that every effective combination or agreement to carry out a program against the public interest of which I have had any knowledge in this whole insurance study would be prohibited by the very section the Senator from Kentucky has quoted.

While the Senator's comment does not properly define the precise limitations under Section 3(b)—his interpretation would appear to prohibit concerted rate-fixing by insurance companies—his interpretation is inconsistent with petitioners' narrow construction of the provision.

The source of the Act apparently was a proposed bill that the National Association of Insurance Commissioners submitted to Congress on August 29, 1944, less than three months after the decision in *South-Eastern Underwriters.* Section 4(c) of the bill provided that "[n]othing contained in this section shall render the said Sherman Act inapplicable to any act of boycott, coercion, or intimidation." 90 Cong. Rec. A4406 (1944). In accompanying documents, the Association explained the unrestricted scope of its proposed Section 4(c). It noted that it "is to take effect immediately, and perhaps needs no detailed comment. It does not preclude the application of the Sherman Act to acts of boycott, coercion, and intimidation." 90 Cong. Rec. A4407 (1944). The Association stated (90 Cong. Rec. A4406 (1944)):

> No exemption is sought nor expected for oppressive or destructive practices. On the whole, insurance has been conducted on a high plane, with great benefit to the public, and if

> inconsistent procedures are found they must be eradicated. Provision is made that the Sherman Act shall not now or hereafter be inapplicable to any act of boycott, coercion, or intimidation.

If the Association, which represented the state regulators who were concerned about the possible adverse impact of *South-Eastern Underwriters* upon their authority, wanted to limit the applicability of the Sherman Act to boycotts, coercion or intimidation that were directed only against members of the industry, it would have said so. Instead, it proposed that the Sherman Act would remain applicable to "any" of those practices.

These views of the agency that was a major proponent of the legislation and that played an important role in its drafting are entitled to substantial weight. Cf. *Chicago & North Western Railway Co.* v. *United Transportation Union,* 402 U.S. 570, 576.

2. The view that Section 3(b) is limited to "blacklists" of agents and companies and "similar punitive measures" directed against other non-policyholders (Pet. Br. 29) apparently originated in *Transnational Insurance Co.* v. *Rosenlund*, 261 F. Supp. 12 (D. Ore.). There the court referred to a single page in the Congressional Record, 91 Cong. Rec. 1087 (1945), as supporting its reading of the statute. 261 F. Supp. at 26–27. That legislative history is the foundation for subsequent opinions[3] restricting Section 3(b) to blacklists (Pet. App. 6a–7a).

[3] Principally, *Addrisi* v. *Equitable Life Assurance Society of the United States*, 503 F. 2d 725 (C.A. 9), certiorari denied, 420 U.S. 929; *Meicler* v. *Aetna Casualty & Surety Co.*, 506 F. 2d 732 (C.A. 5).

The citation is to Congressman Celler's statement that Section 3(b) was concerned not only with isolated acts, but also with agreements to boycott, coerce, or intimidate. While that statement emphasized the danger of "blacklisting" of companies and the "separation" of agents, it contains no suggestion that these were the only persons whom Congress intended to protect against boycotts, coercion and intimidation. Although Senator O'Mahoney also referred to blacklists of companies and agents (91 Cong. Rec. 1485–1486 (1945)), his statement similarly "demonstrates only that such blacklists were a concern of the Congress—perhaps even the principal concern—but does not show that they were the *only* concern." *Proctor, supra,* 561 F. 2d at 273 (emphasis in original). See Pet. App. 17a.[4]

[4] This Court's statement in *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U.S. 453, that "[t]he McCarran-Ferguson Act was an attempt to * * * assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation" (*id.* at 459; see, also, *id.* at 460) is not inconsistent with this analysis. The question in that case was whether a state law "aimed at protecting the interests of those who own securities in insurance companies" (*id.* at 458) was a law "regulating the business of insurance" under the McCarran-Ferguson Act, so that its existence barred the application of the antifraud provisions of the federal securities law to misrepresentations to stockholders made in connection with a merger of insurance companies. The Court's statement must be read in the light of the issue before it. The Court was not there dealing with the scope of Section 3(b), which involves the wholly different question of the

In the court of appeals, petitioners argued that Section 3(b) deals only with insurance company practices directed against members of the industry itself, *i.e.*, blacklisting of agents and insurance companies.[5] In this Court, however, they contend that the section has a broader reach, *i.e.*, that it applies to "traders in other industries [compelled] to conform their competitive practices to the terms of a conspiracy" (Pet. Br. 30). The same reasons that show Section 3(b) is not limited to boycotts, coercion or intimidation that are directed against members of the insurance industry, also refute petitioners' present reading of the provision. Moreover, petitioners' interpretation may well cover respondents: they are traders (doctors) compelled to conform one aspect of their competitive practices (the assurance to patients and hospitals that they possess adequate malpractice insurance) to the terms of the conspiracy.

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application of the Sherman Act to boycotts, coercion, and intimidation.

Furthermore, the kind of regulation that Congress was seeking to preserve by the McCarran-Ferguson Act was of the normal business relationships between insurers and policyholders—such as rates, policy terms and conditions, and the financial stability of the companies—that the states previously had exercised for many years. Congress was not seeking to preserve, at the expense of federal regulation, state regulation of insurance companies' boycotts, coercion and intimidation of policyholders.

[5] Brief in court of appeals for appellees St. Paul and Travelers, p. 14; Brief in court of appeals for appellees Aetna and Hartford, pp. 11–19.

II

RESPONDENTS HAVE ALLEGED A "BOYCOTT" UNDER THE SHERMAN ACT AND SECTION 3(b) OF THE McCARRAN-FERGUSON ACT

Petitioners argue (Br. 14–41) that the "boycott" charged in respondents' complaint does not constitute a "boycott" under either the Sherman Act or Section 3(b) of the McCarran-Ferguson Act. They claim that (1) a "boycott" under the Sherman Act means a concerted refusal to deal with business competitors, and (2) if a boycott were construed to include the actions alleged in the complaint, it would intrude the Sherman Act into relationships between insurance companies and their customers that the McCarran-Ferguson Act was designed to shield from federal antitrust regulation. As the court of appeals noted (Pet. App. 8a), petitioners apparently did not make the first argument in that court.

Contrary to petitioners' contention, a "boycott" under the Sherman Act is not limited to action directed against competitors, but covers any concerted refusal to deal. In *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 465, the Court stated that the Guild's plan to eliminate unauthorized copying of women's clothing violated the policies of the Sherman Act because, among other things, it "subjects all retailers and manufacturers who decline to

comply with the Guild's program to an organized boycott (*Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U.S. 600, 609–611)." Similarly, in *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 250, the Court upheld the Commission's finding that an agreement by a group of shipping lines prohibiting travel agents from selling tickets on vessels of nonmembers contravened the purposes of the antitrust laws, since, "[u]nder the Sherman Act, any agreement by a group of competitors to boycott a particular buyer or group of buyers is illegal *per se*."

In *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, the Court held that an alleged combination among "manufacturers, distributors and a retailer" (*id.* at 213) "either not to sell to Klor's [a competing retailer] or to sell to it only at discriminatory prices and highly unfavorable terms" (*id.* at 209), constituted a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. 1, since "[g]roup boycotts, or concerted refusals by traders by traders to deal with other traders, have long been held to be in the forbidden category" (*id.* at 212; footnote omitted).[6] See also *Union Circulation Co.* v. *Federal Trade Commission*, 241 F. 2d 652, 656–658 (C.A. 2), which held that

[6] Similarly, in *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656, upon which petitioners rely (Br. 23), the complaint alleged that the defendants had refused to sell gas to customers who purchased gas heaters from the defendants' competitors. The Court held that the complaint—which thus alleged a refusal to deal with customers—charged a violation of Section 1 of the Sherman Act.

a concerted refusal by firms selling magazines subscriptions to employ certain salesmen was an unlawful "boycott" in violation of Section 1 of the Sherman Act.[7]

Respondents' complaint charged a boycott under these principles. Respondents alleged that three of the petitioner insurance companies (Aetna, Travelers and Hartford) concertedly refused "to accept any applications for medical malpractice insurance of any type from any physicians, hospitals or other medical personnel presently insured by defendant, St. Paul" (¶ 32, Pet. App. 47a–48a). The charge was not just a refusal to deal except on certain terms, but a refusal to deal at all. Such a blanket refusal to deal is a classic example of a boycott that the Sherman Act condemns. There is accordingly no occasion in this case to determine the precise contours of what constitutes a boycott under either the Sherman Act or the McCarran-Ferguson Act (cf. Pet. Br. 14–16).

As we have shown (pp. 12–13, *supra*), the congressional purpose in the McCarran-Ferguson Act of preserving state authority to regulate and tax the business of insurance would not be thwarted by construing

[7] See, also, Kirkpatrick, *Commercial Boycotts as Per Se Violations of the Sherman Act*, 10 Geo. Wash. L .Rev. 302 (1942); Comment, *Refusals to Sell and Public Control of Competition*, 58 Yale L.J. 1121 (1949); Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. Pa. L. Rev. 847, 872 (1955); Buxbaum, *Boycotts and Restrictive Marketing Arrangements*, 64 Mich. L. Rev. 671 (1966); Rahl, *Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case*, 45 V. L. Rev. 1165 (1959); Note, *Concerted Refusals to Deal under the Federal Antitrust Laws*, 71 Harv. L. Rev. 1531 (1958).

"boycott, coercion, or intimidation" in Section 3(b) to cover such practices by the insurance industry when Sherman Act to the boycott charged in this case directed against policyholders. Application of the would not clash with any regulatory scheme of the state of Rhode Island, which neither requires nor sanctions such activities.[8] The situation here is thus similar to that in other cases in which this Court has held that under the McCarran-Ferguson Act the existence of state regulation of some aspects of the subject of federal regulation does not bar the latter as long as the two regulatory schemes are "perfectly compatible" (*Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U.S. 453, 463 (federal securities laws); *Federal Trade Commission* v. *Travelers Health Association*, 362 U.S. 293 (false advertising)).

[8] Rhode Island has authorized its Commissioner of Insurance to require insurers to participate in a Joint Underwriting Association offering medical malpractice coverage. The Commission may require such coverage to be offered on an "occurrence" or a "claims made" basis. 1976 R.I. Pub. Laws, ch. 1, § 1 and ch. 79, § 1; R.I. Gen. Laws, § 42–14.1–1 (1976).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
JOHN H. SHENEFIELD,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
Deputy Solicitor General.
RICHARD A. ALLEN,
Assistant to the Solicitor General.
JOHN J. POWERS III,
WILLIAM D. COSTON,
Attorneys.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-240

ST. PAUL FIRE & MARINE INSURANCE COMPANY, et al.,

Defendants-Appellants,

vs.

DAVID M. BARRY, et al.,

Plaintiffs-Appellees.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

MOTION OF BLUE SHIELD ASSOCIATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

JAMES W. RANKIN
ROGER G. WILSON
MILDRED B. LEVY
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

Attorneys for Blue Shield Association

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

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MOTION OF BLUE SHIELD ASSOCIATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Blue Shield Association ("BSA"), a nonprofit association of sixty-nine nonprofit medical prepayment plans located throughout the United States, hereby moves this Court pursuant to Rule 42(3) for leave to file an *amicus curiae* brief in support of the appellants St. Paul Fire & Marine Insurance Company, Aetna Casualty & Surety Co., Hartford Casualty Co. and Hartford Fire Insurance Co., and Travelers Insurance Co. BSA has been refused permission to file an *amicus curiae* brief by one or more parties to this appeal.

I.

THE INTEREST OF BLUE SHIELD ASSOCIATION IN THIS APPEAL

More than 85 million persons in the United States were served by the sixty-nine Blue Shield Plans in both private and government business during 1976. Furthermore, in 1976 alone, Blue Shield Plans paid out more than $8 billion in medical benefits for their subscribers. All Blue Shield Plans belong to the Blue Shield Association, a nonprofit organization which, among other things, administers the various Membership Standards relating to containment of health care costs and other matters.

All Blue Shield Plans are regulated by the states whose citizens they serve. Consequently, innumerable federal courts have held that Blue Shield Plans, or Blue Cross Plans (which are nonprofit hospital prepayment plans), are engaged in the "business of insurance" and regulated by the States within the meaning of the McCarran-Ferguson Act. 15 U.S.C. § 1012(b) (1970). *See, e.g., Travelers Insurance Company v. Blue Cross of Western Pennsylvania*, 481 F.2d 80 (3rd Cir. 1973), *cert. denied*, 414 U.S. 1093 (1973); *Doctors, Inc. v. Blue Cross of Greater Philadelphia*, 1977-1 Trade Cases ¶ 61,420 (3rd Cir. 1977); *Anderson v. Medical Service of the District of Columbia*, 1976-1 Trade Cases ¶ 60,884 (E.D. Va. 1976), *aff'd*, 551 F.2d 304 (4th Cir. 1977); *State of Ohio v. Ohio Medical Indemnity*, 1976-2 Trade Cases ¶ 61,128 (S.D. Ohio 1976).

II.

RELEVANT ISSUES WHICH MAY NOT ADEQUATELY BE PRESENTED BY THE PARTIES TO THIS APPEAL

Because the activities of Blue Shield Plans differ in many respects from those of the Defendants-Appellants and, in particular, from the medical malpractice insurance policies at issue in this case, BSA is concerned that the parties to this appeal may not afford this Court an opportunity to consider the impact of the First Circuit's decision on the 85 million Americans who finance their health care through nonprofit medical prepayment plans. Unlike the commercial insurers involved in this case which are regulated by the states' standard commercial insurance statutes, many Blue Shield Plans are regulated by the states pursuant to special nonprofit medical prepayment statutes usually administered by the state insurance commissioners. *See, e.g.*, N.Y. Insurance Law § 250 *et seq.* (McKinney 1966); Ill.Rev.Stat. 1975, ch. 32, § 551 *et seq.*; Mass.Ann.Laws, Ch. 176B, § 1 *et seq.* (1969). From these special statutes arise several fundamental aspects of Blue Shield Plans which distinguish them from most commercial, profit-oriented insurers. The First Circuit's decision might impair the ability of Blue Shield Plans to control health care costs effectively, one of the distinctive aspects of the Plans. For example, imaginative antitrust plaintiffs' counsel have attempted unsuccessfully in the past to characterize Blue Shield's cost control programs, though regulated by the states, as acts of boycott, coercion or intimidation within the exception to the McCarran-Ferguson Act.

CONCLUSION

In short, the First Circuit's decision may affect several fundamental aspects of Blue Shield's cost containment programs for health care financing. The commercial insurers who are parties to this appeal are not engaged in the nonprofit medical prepayment business. Accordingly, BSA respectfully requests this Court for leave to file an *amicus curiae* brief in support of the appellants.

Respectfully submitted,

JAMES W. RANKIN
ROGER G. WILSON
MILDRED B. LEVY
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

Attorneys for
Blue Shield Association

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On Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS AMICUS CURIAE

Jon S. Hanson
Counsel of Record

David J. Brummond
Counsel

NAIC Central Office
633 West Wisconsin Avenue
Suite 1015
Milwaukee, Wisconsin 53203
Telephone: (414) 271-4464

Attorneys for the Amicus Curiae

HAMMERSMITH-BREITHAUPT PRINTING CORP., MILWAUKEE, WIS. 53212

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et al., Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE BY THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

COMES NOW the National Association of Insurance Commissioners (NAIC), through its counsel of record, Jon S. Hanson, to move this Court for leave to file the attached brief as *amicus curiae* in this case. Counsel for the Petitioners has consented to the filing of the attached brief. The consent of counsel for Respondents was requested but refused.

The interest of the NAIC as *amicus curiae* is set forth at pages 1-2 of the attached brief. The specific issue in this case is the scope of the "boycott, coercion, or intimidation" exception to the McCarran Act, 15 U.S.C. § 1011-15 (1970). Since the provisions of that Act recognize and support the authority of the members of the NAIC to regulate the business of insurance in the United States, any limitation on that authority through a broadening of the Act's exception will directly affect each member of the NAIC. The attached brief describes the adverse impact of the lower court's decision on the ability of state insurance commissioners to regulate the business of insurance in the public interest and offers a suggested standard for this Court to follow in this and future cases involving the scope of the "boycott, coercion, or intimidation" exception to the McCarran Act.

Respectfully submitted on this 30th day of December, 1977,

/s/
Jon S. Hanson
Counsel of Record

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-240

ST. PAUL FIRE & MARINE INSURANCE CO., *et al., Petitioners,*

v.

DAVID M. BARRY, M.D., *et al., Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

The National Association of Insurance Commissioners (NAIC) is an unincorporated association of the principal insurance regulatory officials charged by law with the responsibility of supervising the business of insurance within each state, territory and insular possession of the United States. Since each of its members regulates the business of insurance as Congress intended under the McCarran Act, 15 U.S.C. § 1011-15 (1970), any interpretation of that Act which modifies or diminishes the present scope of state insurance regulation would seriously jeopardize the ability of each member of the NAIC to continue to oversee the business of insurance in the

public interest. The lower court's expansive view of the "boycott, coercion, or intimidation" exception to the McCarran Act, in the opinion of the NAIC, would lead to such a modification or diminution. For this reason the NAIC is vitally interested in the outcome of this litigation.

The effect of the lower court's ruling would be to allow policyholders to sue insurers under federal antitrust laws whenever insurer activity took on the appearance of a "concerted refusal to deal," or boycott. Because the risk assessment process in insurance theory, by its very nature, often involves both concerted activity and refusals to deal on the part of insurers, an inherent inconsistency arises between fundamental principles of insurance theory and the lower court's expansive definition of the "boycott, coercion, or intimidation" exception to the McCarran Act. The purpose of the attached brief is to describe in greater detail the nature of this inconsistency and explain the serious ramifications it creates for state insurance regulation.

Because this case involves the impact of antitrust principles on fundamental precepts of insurance theory the NAIC believes that its experience in regulating the insurance business can provide this Court with needed insights into insurance principles which the parties to this case may not be equipped to provide for a proper resolution of this dispute. Moreover, as an organization of state government officials charged by law with regulating the business of insurance in the public interest, the NAIC believes that it stands in a unique position to advise this Court of the actual and potential harms to the public interest which would result if the lower court's decision is not reversed or modified.

ARGUMENT

I. THE INCLUSION OF INSURER-INSURED RELATIONSHIPS WITHOUT LIMITATION UNDER THE SCOPE OF THE "BOYCOTT, COERCION, OR INTIMIDATION" EXCEPTION TO THE McCARRAN ACT WOULD SERIOUSLY IMPEDE THE ABILITY OF THE STATES TO REGULATE THE BUSINESS OF INSURANCE.

The lower court in its decision below held that the phrase "boycott, coercion, or intimidation" in the McCarran Act, 15 U.S.C. §1013(b) (1970), included within its scope alleged boycotts of policyholders by insurance companies who were in the business of selling medical malpractice insurance policies to Rhode Island doctors. *Barry v. St. Paul Fire & Marine Ins. Co.*, 555 F.2d 3, 12 (1st Cir. 1977). Although the court below recognized that its decision contradicted "a rather formidable array of authorities," 555 F.2d at 7, it nevertheless felt compelled by the "wording" of the McCarran Act "and its legislative history" to broaden the scope of the "boycott" exception. *Id.*

In support of its novel position the First Circuit Court of Appeals noted that "the introduction of antitrust principles . . . between policyholders and insurers" would not "hamstring the state regulatory bodies that have primary responsibility for overseeing the nation's insurance business." 555 F.2d at 8. As *amicus curiae* the NAIC strenuously disagrees with this contention. Because state insurance regulation exists primarily "to pro-

tect the weaker contracting party,"[1] the thrust of most, if not all, state regulatory measures are aimed at "the relationship between insurer and insured." *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969). To interject a federal antitrust concept of "boycott, coercion, or intimidation" on existing state insurance regulatory measures which focus on insurer-insured relationships would seriously impede such measures by making the federal courts the final regulator of insurance industry conduct.

A. Principles of Risk Assessment in Insurance Theory and the Federal Antitrust Concept of "Boycott"

The result of the lower court's decision in this case is to impose upon the insurer-insured activities federal antitrust prohibitions against boycotts. Because the business of insurance utilizes certain principles of risk assessment which are inimical to the concept of "boycott" under federal antitrust laws, an understanding of the inherent contradiction between these two ideals is critical for a proper resolution of the specific McCarran Act controversy now before this Court.

It is a fundamental tenet of insurance theory that "the basic function of insurance is to deal with risk."[2] Risk assessment, then, is central to the "business of insurance"; by measuring "the probable variation of actual experience from expected experience"[3] insurance companies

[1] Kimball, *The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law*, 45 MINN. L. REV. 471, 523 (1961) [hereinafter cited as Kimball].

[2] R. MEHR & E. CAMMACK, PRINCIPLES OF INSURANCE 19 (15th ed. 1972) [hereinafter cited as R. MEHR & E. CAMMACK].

[3] *Id.* at 20.

offer their insureds the substitute of "a small, definite cost (the premium) for a large but uncertain loss,"[4] with the hope that the "law of large numbers" will eventually return a profit to the companies for their risk-reducing services. Traditionally, risk assessment in insurance theory has been accomplished through two separate, but related, procedures: rating and underwriting.[5] Rating is the process "by which companies determine the premium amounts an individual should pay";[6] underwriting is the process of selecting risks "in order to determine which of those within a given class offers a probability of loss below that for the average of the class."[7]

Implicit in the underwriting process of risk assessment is the insurance company's prerogative not to insure particular risks. This prerogative exists to protect the insurance company against the phenomenon of "adverse selection":

> Whenever a large group of potential insureds are treated alike irrespective of some factor that differentiates them as insurance risks, a disproportionately high percentage of applications for such insurance tends to come from the less desirable applicants because they get the better bargain.[8]

Since there will always be selection in insurance, the only question which must be answered is "whether the

[4] *Id.* at 32.

[5] COMMONWEALTH OF MASS., DIVISION OF INSURANCE, RESEARCH PAPERS ON CLASSIFICATION SYSTEMS IN AUTOMOBILE INSURANCE 2-3 (unpublished working papers prepared for use during automobile rate hearings, Sept. 1977).

[6] *Id. See also* R. MEHR & E. CAMMACK at 641.

[7] R. HOLTON, UNDERWRITING PRINCIPLES AND PRACTICES 123 (1973).

[8] R. KEETON, BASIC TEXT ON INSURANCE LAW 8 (1971).

selection will be done by the insurance company or by the insurance buyer."[9] In the absence of massive government subsidies to insurers the only feasible answer to this question is to allow insurance companies to be selective in choosing the risks they wish to insure;[10] otherwise insurance coverage would be provided at a loss — a result which would ultimately lead to either the financial impairment of insurers or a broadscale unwillingness of insurers to write any business, i.e., insurance unavailability.

A basic characteristic of the rating aspect of the risk assessment process is the inherent necessity for insurance companies to share information about their claims and loss experience. Because premium rates

> are constructed primarily from statistical data . . . [t]he accuracy of the rates, as measures of relative expected losses and expenses, increase with the number of insured exposure units embraced by the data.[11]

Thus, the need for a large pool of statistical data has led the insurance industry to develop and utilize the services of rating and statistical organizations to extract "information pursuant to a standardized plan from a large number of insurers" so that "sufficient information . . . to make accurate rates" is available to all participating insurers.[12] Not only does utilization of such organi-

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[9] R. MEHR & E. CAMMACK at 614.

[10] *See id.* at 615.

[11] J. HANSON, R. DINEEN & M. JOHNSON, MONITORING COMPETITION: A MEANS OF REGULATING THE PROPERTY AND LIABILITY INSURANCE BUSINESS 445 (1974) [hereinafter cited as MONITORING COMPETITION].

[12] *Id.* It might be noted that two conditions of effective competition are the existence of numerous sellers and the ease of entry into the market. The availability of pooled information contributes to both since smaller and medium sized companies, and even large companies for some lines of insurance, lack sufficient credible experience of their own.

zations by insurance companies provide the necessary data to make accurate rates, but it also offers a more efficient and economical method of employing scarce actuarial talent to perform services which would be duplicated by individual companies in the absence of a central data-gathering organization.[13]

If this Court's definition of term "boycott" in antitrust law is compared with the characteristics of the rating and underwriting processes just noted, a striking similarity emerges between the antitrust concept of boycott and the basic features of risk assessment in the business of insurance. The term "boycott" in antitrust law has been defined as a "concerted refusal to deal." *E.g., Klor's, Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207, 212 (1957); *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 625 (1953). It implies two necessary elements: (1) concerted activity on the part of the accused parties from which an implied conspiracy can be inferred, and (2) a refusal to deal with others. As was just noted, however, the rating process in risk assessment, by its very nature, involves "concerted" action by insurance companies; when companies share actuarial talent and agree to compile their claims experience data through rating and statistical organizations they undertake "concerted" activities. Furthermore, the underwriting process in risk assessment, by its very nature, involves "refusals to deal" on the part of an insurer whenever there is an unwillingness to write a particular risk or class of risks to protect against the consequences of adverse selection.

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[13] MOWBRAY, BLANCHARD & WILLIAMS, INSURANCE: ITS THEORY AND PRACTICE IN THE UNITED STATES 502 (1969).

If the antitrust concept of "boycott" were extended to insurer-insured relationships the definition of "boycott" would come perilously close to describing the risk assessment process in the business of insurance. In fact, there appears to be little conceptual difference between a "concerted refusal to deal" under a "boycott" analysis and the combined effect of rating and underwriting in those situations where an insured is denied insurance or refused the renewal of existing insurance coverage. The rating process of risk assessment satisfies the "concerted activity" element of a boycott, while the underwriting process meets the "refusal to deal" standard. At the very least, insurance industry activity in the submission and compilation of experience data and the subsequent use of such data to support refusals or denials of insurance coverage would provide a superficial base for a judicial finding of an implied conspiracy to refuse insurance coverage. *E.g., United States v. Container Corp.,* 393 U.S. 333, 336-38 (1969); *United States v. American Linseed Oil Co.,* 262 U.S. 371, 389 (1923); *American Column & Lumber Co. v. United States,* 257 U.S. 377, 410 (1921).

The risk assessment process in insurance theory, therefore, and the term "boycott" under federal antitrust law are similar phenomena. Under the former label "concerted refusals to deal" are sanctioned and even required for a proper functioning of the insurance concept, while under the latter label they are prohibited as a violation of the Sherman Act. It is this inherent contradiction between insurance theory and antitrust law that lies at the heart of the McCarran Act controversy now before this Court.

B. Insurer-Insured "Boycotts" and State Regulation of the Risk Assessment Process.

The contradictory nature of insurance theory and the antitrust principle of a "boycott" takes on very practical significance when the various state laws regulating the risk assessment process are considered in light of the lower court's sanctioning of a federal cause of action for a "boycott" in this case. In regulating the "business of insurance" pursuant to the will of Congress under the McCarran Act, 15 U.S.C. § 1011 (1970), the states have developed detailed guidelines for insurance companies to follow in their risk assessment activities:

> The risk assessment process is of substantial importance to both buyers and sellers of . . . insurance. If companies fail to identify high risks in . . . insurance, they may sustain serious losses or endanger the financial well being of other policyholders. On the other hand, if companies improperly assess normal risks as high risks, consumers may suffer the consequences of overpricing. For these dual reasons — to protect the solvency of insurers while guarding the rights of consumers — government regulation has long involved itself in the risk assessment process.[14]

Contrary to the view of the First Circuit Court of Appeals in this case, "the introduction of antitrust principles into dealings between policyholders and insurers" would indeed "hamstring the state regulatory bodies that have primary responsibility for overseeing the nation's insurance business." 555 F.2d at 8. As *amicus curiae,* the NAIC suggests that the unlimited extension of antitrust principles to insurer-insured relationships will be particularly burdensome to state insurance regulators, and

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[14] COMMONWEALTH OF MASS., DIVISION OF INSURANCE, RESEARCH PAPERS, *supra* note 6, at 2-3.

in turn the insurance-consuming public on whose behalf they regulate, in at least four areas of insurance regulation: property-casualty insurance rates, insurance availability, approval of policy forms and company solvency.

1. Interference With State Regulation of Property-Casualty Insurance Rates.

Although insurance rates for individual life insurance, health insurance and ocean marine insurance, generally speaking, are not regulated by state insurance commissioners,[15] rates for property-casualty insurance are subject to the control of state insurance departments in virtually all states and the District of Columbia.[16] There is no question that insurance rating laws regulate the "business of insurance" as Congress intended under the McCarran Act. *See SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969); *Ohio AFL-CIO v. Insurance Rating Board*, 451 F.2d 1178 (6th Cir.) *cert. denied* 409 U.S. 917 (1971). Although state laws regulating property-casualty rates follow at least nine different models or formats,[17] two broad categories of laws are generally recognized as appropriate descriptions of divergent state philosophies toward rate regulation: "prior approval" rating laws and "open competition" rating laws.[18] It is the belief of the NAIC that an extension of the "boycott, coercion, or intimidation" exception to the McCarran Act to insurer-insured relationships would not only severely hamper the ability of state insurance regulators to administer either type of rating law, but would place the ultimate regulatory authority over property-casualty insurance

[15] R. MEHR & E. CAMMACK, *supra* note 2, at 8.

[16] *See* MONITORING COMPETITION, *supra* note 11, at 58.

[17] *See id.* at 54-57.

[18] *See id.* at 57. *See also* R. MEHR & E. CAMMACK at 793 ("mandatory" versus "permissive" rating laws).

rates in the hands of the federal courts.

Under a "prior approval" rating law insurers are required to submit their rate proposals to the insurance department in advance subject to department's approval or disapproval. Rates may be filed either by insurers individually or by a rating bureau on behalf of insurers who use the bureau rates. Once the proposed rates have been filed with the insurance department, the commissioner of insurance reviews the filings under a statutory standard that rates not be "excessive, inadequate nor unfairly discriminatory."[19] One of the primary purposes of the commissioner's review of the proposed rates is to ensure that "the insured gets what he pays for."[20]

If this Court extends the "boycott" exception to insurer-insured relationships on an unlimited basis, the decision of the commissioner approving particular property-casualty rate levels in "prior approval" states will be subject to challenge by insureds who are dissatisfied with the commissioner's approval of the particular rate which they must pay. For example, insureds or potential insureds could invoke the boycott exception by simply alleging that they were refused coverage at a "reasonable" rate. The facts of *Meicler v. Aetna Casualty & Surety Co.*, 506 F.2d 732 (5th Cir. 1975) bear out this contention, as does the dicta in *Proctor v. State Farm Mutual Auto Insurance Co.*, 561 F.2d 262, 274 (D.C. Cir. 1977). By allowing insureds to sue insurers under federal antitrust laws this Court would in effect substitute the federal court's rulings on the existence of a "boycott" for the

[19] MONITORING COMPETITION at 54-55; R. MEHR & E. CAMMACK at 793. *See also* NAIC Model Casualty and Surety Rate Regulatory Bill, § 3(a)(4), PROCEEDINGS OF NAIC 399 (1946); NAIC Fire, Marine and Inland Marine Rate Regulatory Bill, § 3(a)(2), PROCEEDINGS OF NAIC 411 (1946).

[20] Kimball, *supra* note 1, at 491.

state insurance commissioners' decisions that a particular rate is or is not "excessive, inadequate or unfairly discriminatory."

Similarly, the lower court's extension of the "boycott" exception to insurer-insured relationships would undercut the authority of state insurance commissioners to regulate property-casualty insurance rates in "open competition" states. Since under "open competition" rating laws insurers are neither required to seek advance approval of their rates by the commissioner nor allowed to agree to adhere to bureau rates,[21] the principal test for the "reasonableness"[22] of rates is the degree of competition which exists within the industry with regard to specific lines of property-casualty business.[23] An important element of the commissioner's role in regulating insurance rates in "open-competition" states, therefore, is to monitor and enforce competition within the insurance industry and, if insufficient competition exists, to reimpose some type of rate approval mechanism.[24] An insurance commissioner's determination that rates were not "excessive" because an adequate degree of competition was found to exist could, in effect, be overturned if

[21] MONITORING COMPETITION at 395.

[22] Like the rating standard under "prior approval" laws, rates will be found to be "reasonable" under an "open competition" law if they are not "excessive, inadequate or unfairly discriminatory." *Id.* at 401. *E.g.*, MINN. STAT. § 70A.04(2) (1968); UTAH CODE ANN. § 31-18-5 (1974); WIS. STAT. § 625.11(1) (1975).

[23] *See* MONITORING COMPETITION at 420.

[24] *See id.* at 132-137, 407. At the recent December, 1977 meeting of the NAIC the NAIC Regulatory Information Subcommittee directed the distribution of a report which outlined for all insurance commissioners a basic program for monitoring competition. This report, as well as other activities of the Subcommittee, reflects the strong interest of the NAIC in developing "workable tests of competition" for the insurance industry. *See* I PROCEEDINGS OF NAIC — (1978).

insureds are allowed to sue insurers under federal antitrust laws for alleged refusals to deal at a desired or "reasonable" rate. In short, an expansive interpretation of the "boycott" exception would give the federal courts the final word on the issue of "excessiveness" of rates in "open competition" states.

2. Interference with State Regulation of Insurance Availability.

A second rationale underlying state regulation of the risk assessment process is the objective of "making insurance facilities available to all people of the state who should reasonably be expected to have these facilities."[25] It is important to recognize that the availability of insurance is often an integral part of contemporary solutions to social problems:

> Insurance does not exist in a vacuum, but in a complex modern society with a developed and dynamic economy. The industrialization and urbanization of modern life, with the attendant deterioration of such social institutions as the extended family which were of vital importance in generations gone by, have brought pressing social problems which cry aloud for solution. In many of them, insurance can be made to play a key role.[26]

By specifically enhancing insurance availability states have frequently employed the insurance mechanism to solve broader socioeconomic problems which, to varying degrees, are premised on "man's search for security."[27]

[25] R. MEHR & E. CAMMACK, *supra* note 2, at 778.

[26] Kimball, *supra* note 1, at 511-12.

[27] *See id.* at 513.

The use of insurance to address such problems has been labeled "socialization of risk":

> If insurance is to carry out fully its role in our society — if it is to provide security and the *sense* of security on a broad basis — it must include almost everyone, at least in certain key fields. Pressure for the extension of insurance coverage is an aspect of what one may call, very loosely, the socialization of risk.[28]

The abolition of tort liability for work-related injuries at the turn of this century represented the first experiment with "socialization of risk" by the states; the Worker's Compensation Acts promulgated during the first two decades of the century eliminated "fault" as a criterion for compensating employees in return for a cerain level of benefits funded by the compulsory insurance coverage of employers.[29] Not long after the Worker's Compensation experiment states began to utilize — on a more limited scale — the "socialization of risk" principle in the automobile insurance field. States addressed the growing problems of automobile accident reparations by enacting compulsory insurance and financial responsibility laws with accompanying automobile insurance plans to provide insurance to "applicants (rejected risks) who could not obtain automobile liability insurance in the usual manner."[30] Like the predecessor Worker's Compensation Acts, the automobile insurance plans were a type

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[28] *Id.* at 512.

[29] J. LEE, SERVICING THE SHARED AUTOMOBILE INSURANCE MARKET 8-1 (1977) [hereinafter cited as J. LEE]; REPORT OF THE NATIONAL COMM. ON STATE WORKMEN'S COMPENSATION LAWS 34 (1972).

[30] J. LEE at 9. The states of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, the District of Columbia, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New

of "residual market mechanism"[31] which introduced "socialization of risk" principles as part of an overall package of accident-loss reparations reform.[32]

Today the "socialization of risk" concept has been expanded beyond the worker's compensation and automobile liability insurance examples to almost all phases of the property-casualty insurance field as part of an attack on broader socioeconomic problems. Fair Access to Insurance Requirements, or FAIR Plans, have been enacted in 28 states[33]

> to make fire and extended coverage insurance available to persons having difficulty finding insurers who would write this insurance for them. . . ."[34]

Joint Underwriting Associations, or JUA's, have been established in 35 states[35] to provide medical malpractice

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Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming are currently served by automobile insurance plans. AUTOMOBILE INSURANCE PLANS OFFICE, INSURANCE FACTS — 1977 at 3 (1977).

[31] Besides the automobile insurance plans, three alternative forms of residual market mechanisms have been implemented by the states to deal with the residual automobile insurance market. These alternative forms include reinsurance facilities, joint underwriting associations and a state-operated insurance company. J. LEE at 14.

[32] *See* CALIFORNIA CITIZEN'S COMM. ON TORT REFORM, RIGHTING THE LIABILITY BALANCE 3 (1977) [hereinafter cited as CALIF. CITIZEN'S COMM.].

[33] These states include California, Connecticut, Delaware, the District of Columbia, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Puerto Rico, Rhode Island, Virginia, Washington and Wisconsin. *See* I PROCEEDINGS OF NAIC 693 (1977).

[34] R. MEHR & E. CAMMACK, *supra* note 2, at 779.

[35] These states include Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota,

insurance to health care providers "who cannot obtain coverage in the private insurance market"[36] because of rapidly changing conditions in the health care liability field. Moreover, 23 states[37] have recently instituted or are planning to institute "Market Assistance Programs," or MAP's, for products liability insurance to alleviate the short-term insurance availability needs of manufacturers and suppliers until solutions are found to the broader problems of product liability.[38] Each residual market program plays an important role in "socializing" to varying degrees the respective insurance risks which reflect underlying socioeconomic problems.

The vulnerability of the various residual market mechanisms to boycott litigation results from a combination of two factors. First, residual market mechanisms are typically operated by insurers on a collective basis, even though under the directives of state insurance codes and the supervision of the insurance commissioner. Second, even under residual market programs not all risks are insurable; unlicensed drivers and hazardous property locations are examples of such uninsurable risks. Since

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Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia and Wisconsin. IV NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, NAIC MALPRACTICE CLAIMS 131-32 (May, 1977) [hereinafter cited as NAIC MALPRACTICE CLAIMS].

[36] *Id.* at 148.

[37] These states include Arkansas, Connecticut, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, Washington and Wisconsin. Miller, *Report on Status of State Activation of Insurance Industry's Voluntary Response to Alleged Product Liability Insurance Availability Shortage,* I PROCEEDINGS OF NAIC — (1978).

[38] *See* Report of the Products Liability (D2) Industry Advisory Committee, II PROCEEDINGS OF NAIC 635, 652 (1977).

insurers work together under residual market mechanisms and since coverage may be denied in certain instances — no matter how meritorious the denial — the elements of a "concerted refusal to deal," or boycott, are inherent in the insurers' activities in the residual market programs. As a consequence, an expansive definition of the "boycott" exception to the McCarran Act jeopardizes a host of residual market programs now functioning in most states.

The illogic of extending the "boycott" exception to insurer-insured relationships in the context of insurance availability arises from the narrow perspective of the antitrust concept of "boycott." The various state insurance laws establishing residual market mechanisms *assume* that the insureds on whose behalf the residual market mechanisms operate cannot obtain insurance coverage in the voluntary marketplace.[39] This assumption stems from a recognition that a lack of insurance availability is essentially a symptom of deeper, socioeconomic problems,[40] of which "social inflation,"[41] economic inflation,[42] expanding public concepts of adequacy or com-

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[39] *See* J. LEE, *supra* note 29, at 9; NAIC MALPRACTICE CLAIMS, *supra* note 35, at 148; U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, REPORT OF THE FEDERAL INSURANCE ADMINISTRATION 1 n. 1 (1974). *See also* NEV. REV. STAT. § 686B.180 (1973); N. H. REV. STAT. ANN. § 404-C:1 (1976); WIS. STAT. § 619.01 (1975).

[40] *See* J. LEE, *supra* note 29, at 5. *See also* FEDERAL INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT at I-21 (1977) [hereinafter cited as PRODUCT LIABILITY REPORT]; U.S. DEP'T OF HEALTH, EDUC. & WELFARE, REPORT OF THE SECRETARY'S COMM. ON MEDICAL MALPRACTICE 4 (1973) [hereinafter cited as MEDICAL MALPRACTICE REPORT].

[41] Watkins, *Social Inflation: Our Next Trial,* INSURANCE MAGAZINE 42 (Sept. 1976). *See also* CALIF. CITIZEN'S COMM., *supra* note 32, at 6; MEDICAL MALPRACTICE REPORT at 3, 25; PRODUCT LIABILITY REPORT at I-29 to I-30.

[42] *See* CALIF. CITIZEN'S COMM. at 10; J. LEE at 5; PRODUCT LIABILITY REPORT at I-29.

pensation,[43] and the depersonalization of industrial society[44] are only a few. By addressing the insurance availability consequences of these problems through residual market mechanisms states are able to satisfy the immediate insurance needs of certain segments of the insurance-buying public while simultaneously instituting long-range social reforms on a broader scale. If the various state residual market mechanisms are rendered illegal, uncertain or circumventable by individuals or groups of persons involved in an antitrust lawsuit, all efforts to make insurance available to the maximum extent possible through residual market pooling mechanisms could come to a grinding halt.

Moreover, regulatory approaches aimed at assuring availability of insurance coverages are designed to benefit a broad spectrum of potential policyholders without the necessity of lengthy and costly antitrust litigation. FAIR Plans, for example, make insurance coverage available to property owners in the inner cities.[45] In most cases these property owners do not constitute a politically effective group. If the availability of insurance coverage is made to depend on federal antitrust litigation instead of state residual market mechanisms such as FAIR Plans, only the most organized, financially-supported groups — such as state medical societies — will be able to enforce their "rights" to needed insurance coverage. Other persons, such as inner city property owners, may be less

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[43] *See* CALIF. CITIZEN'S COMM. at 9. *See also* MEDICAL MALPRACTICE REPORT at 70.

[44] *Cf.* MEDICAL MALPRACTICE REPORT at 25 (depersonalized physician-patient relationships).

[45] *See* REPORT OF THE FEDERAL INSURANCE ADMINISTRATION, *supra* note 39, at 1 n. 1.

capable of enforcing their "rights" to "essential insurance" in the federal courts.[46]

Although the sanctioning of federal "boycott" actions by insureds may appear, on its surface, to be a reasonable alternative to the various residual market mechanisms promulgated by the states to "socialize risks,"[47] it does not provide an institutional framework for effecting collateral social reforms. The narrow, monolithic standard of a "concerted refusal to deal" was never intended to be a vehicle for "socializing risks" in society; its application to social and economic problems extending beyond the general scope of the Sherman Act promises to be counterproductive. Moreover, rendering residual market programs vulnerable to boycott actions may well lead to their demise. Such a result, in turn, will deprive the vast majority of underprivileged policyholders of an effective vehicle to obtain necessary insurance coverage.

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[46] The recent restrictions placed on class actions pursuant to F. R. CIV. PROC. 23 are an example of these obstacles. In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) this Court held that plaintiffs "must bear the cost of notice to the members of [their] class." At least one commentator has observed that this decision

> may well mark the end of massive class actions in both federal and state courts because of the prohibitive nature of the burden that decision places on the representative plaintiffs.

Note, *State Class Action Statutes: A Comparative Analysis*, 60 IOWA L. REV. 93, 119 (1974). Certainly the *Eisen* requirements, at a minimum, will create hardships for inner city property owners and similar economically disenfranchised groups to press their claims for insurance availability through class action federal antitrust lawsuits.

[47] *But see* U.S. DEP'T OF JUSTICE, THE PRICING AND MARKETING OF INSURANCE 347 (Report to the Task Force on Antitrust Immunities, Jan., 1977) (Justice Department acknowledges necessity for "mandatory pooling mechanisms" for automobile liability insurance).

3. Interference with State Regulation of Policy Forms.

A third regulatory function of state insurance laws which would be seriously undermined by an extension of the "boycott" exception to the McCarran Act is the control of policy terms:

> Control over terms ensures both that coverage will be more precisely defined and that restrictive clauses will not unfairly prejudice the policyholder, whether by making his bargain a bad one or by misleading him.[48]

States specifically control the content of insurance policies in one of two ways. The most direct form of control is to mandate policy forms or standard policy provisions by statute; standard policies for fire and worker's compensation insurance and standard provisions for life and health insurance are examples of statutorily-mandated requirements.[49] A second, less direct and more commonly used technique to control policy content is to grant to the commissioner of insurance the general authority to review and approve policy forms.[50] After proposed contract forms are filed with the department of insurance the commissioner reviews the forms to ensure that the policy language is not misleading, that exclusions are not unreasonable, that benefits are reasonable in relation to

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[48] Kimball, *supra* note 1, at 493.

[49] R. MEHR & E. CAMMACK, *supra* note 2, at 812. *See also* NAIC Individual Accident and Sickness Insurance Minimum Standards Act, I PROCEEDINGS OF NAIC 49-53 (1977); NAIC Group Life Insurance Definition and Group Life Insurance Standard Provisions Model Bill, II PROCEEDINGS OF NAIC 361-69 (1956).

[50] Kimball, *supra* note 1, at 493; R. MEHR & E. CAMMACK, *supra* note 2, at 812, *E.g.*, CALIF. INS. CODE §§ 10205, 10270.9 (West 1972); N.Y. INS. LAW §§ 161, 162 (McKinney 1966); WIS. STAT. § 206.17 (1975).

premiums, etc.[51] "Claims made" medical malpractice policies,[52] punitive damage exclusions in general liability policies[53] and mechanic lien waiver conditions in title insurance policies[54] are recent examples of the type of contract terms which may be controlled through the insurance commissioner's review of policy forms.

A broad construction of the "boycott" exception to the McCarran Act would place insurance policy form development and the state approval mechanism in conflict with federal antitrust "boycott" prohibitions. This could arise from a combination of factors. Whenever a policyholder did not obtain the precise coverage he/she desired — such as a policy with high limits, low or no deductible, unlimited types of coverage, certain policy provisions — the policyholder could easily frame an antitrust complaint in terms of alleged insurer "refusal to deal," i.e., refusal to provide the coverage the policyholder wants. When this possibility is combined with the vulnerability

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[51] R. MEHR & E. CAMMACK, *supra* note 2, at 812; NAIC Model Accident and Health Policy Regulatory Law, II PROCEEDINGS OF NAIC 296-98 (1956).

[52] The following state insurance departments have approved "claims made" insurance policies: Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington and Wisconsin. Journal of Commerce, July 11, 1975, at 2, col. 3.

[53] Just recently the Insurance Services Office, a rating and statistical organization, announced plans to "exclude punitive damages from all policies providing liability insurance." Journal of Commerce, August 23, 1977, at 10, col. 1. Before such an exclusion could take effect in a given state, it would have to be approved by the insurance commissioner of that state. *See* note 50 *supra*.

[54] *See* McIlhenny v. American Title Ins. Co., 418 F.Supp. 364, 366-67 (E.D. Pa. 1976).

of policy form development to the allegation of an implied conspiracy due to rating bureau policy form activity and the sharing of information among insurers,[55] allegations of a "concerted group refusal to deal," or "boycott," are inevitable. *See United States v. Container Corp.*, 393 U.S. 333, 336-38 (1969); *United States v. American Linseed Oil Co.*, 262 U.S. 371, 389 (1923); *American Column & Lumber Co. v. United States*, 257 U.S. 377, 410 (1921). The broad definition of the "boycott" exception would thus enable private as well as federal challenges to insurer activity even though the insurer had complied with state insurance laws and had obtained insurance department approval of the very policy giving rise to the "boycott" claim. *See McIlhenny v. American Title Insurance Co.*, 418 F.Supp. 364, 371 (E.D. Pa. 1976). Such a result would surely contradict this Court's earlier determination that state regulation of the business of insurance encompasses regulation of "the type of policy which [can] be issued." *SEC v. National Securities, Inc.*, 393 U.S. at 460.

4. Interference with State Regulation of Insurance Company Solvency.

A major reason states regulate the business of insurance is to protect the solvency of insurers:

> Insurance is one important modern way that man seeks security in a world in which it does not exist naturally. It is thus not surprising that all systems of insurance regulation regard the financial solvency of the insurance enterprise as the central aim, for if nothing else, insurance must *insure*.[56]

[55] Policy forms can be developed in a myriad of ways. Many insurers develop their own forms. Such forms are typically developed with the knowledge of other forms in the marketplace, either through a voluntary exchange of information or through the review of other company filings with the department of insurance. Other policy forms are developed through rating bureaus which individual insurers may use in whole or in part. *See generally* R. KEETON, *supra* note 8, at § 2.10.

This Court clearly recognized that insurer solvency is basic to the "business of insurance" and an integral part of the insurer-insured relationship when it observed that the "reliability" of insurance policies lie at "the core of the 'business of insurance.'" *SEC v. National Securities, Inc.*, 393 U.S. at 460.

The inclusion of the insurer-insured relationship within the "boycott, coercion, or intimidation" exception to the McCarran Act would seriously undermine state regulation of insurance company solvency. Because the antitrust concept of a "boycott" does not recognize that the financial condition of an insurer may justify its "refusal to deal" with other parties,[57] state attempts to regulate the "reliability" of the insurer's relationship to insureds would be thwarted by federal antitrust actions in every instance where an insurer, under its own volition or pursuant to an insurance commissioner's suggestion, reduced its book of business to bolster its financial condition or increased its premium rates to rejuvenate depleted surplus accounts.

The most common enforcement mechanism used by state insurance commissioners to regulate the financial solvency of insurers is to monitor the financial condition of the insurer and utilize the extensive licensing authority provided in state insurance codes[58] to influence the in-

[56] Kimball, *supra* note 1, at 480.

[57] *See* MONITORING COMPETITION, *supra* note 11, at 438.

[58] Pfennigstorf, *The Enforcement of Insurance Laws*, 1969 WIS. L. REV. 1026, 1047 n. 80.

surer's underwriting practices. If, after reviewing the insurer's annual statement,[59] the commissioner determines that the insurer's surplus accounts have been eroded by losses in underwriting or investment operations,[60] the commissioner may use the "significant leverage"[61] of a license revocation, suspension or nonrenewal to "encourage" the insurer to restrict or reduce its volume of business until such time as the insurer's surplus account reaches an acceptable level.[62] Should an insurer fail to heed a commissioner's suggestion and continue to write new business without regard to the adequacy of its surplus accounts, the commissioner could actually suspend, revoke or limit the insurer's certificate of authority to protect policyholders from a potential insolvency.

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[59] R. MEHR & E. CAMMACK, *supra* note 2, at 811:

> Insurance companies are required to file annual reports with insurance departments of the states in which they do business. These reports are made in accordance with a form (called the 'convention blank') developed by the National Association of Insurance Commissioners. These reports are detailed as to premium income, expenses, investments, reserves and other financial information.

[60] For a discussion of the role of surplus accounts under fundamental principles of insurance accounting, *see* R. MEHR & E. CAMMACK at 677-711; Roddis & Stewart, *The Insurance of Medical Losses,* 1975 DUKE L. J. 1281, 1285-89.

[61] MONITORING COMPETITION, *supra* note 11, at 482. *See also* Pfennigstorf, *supra* note 58, at 1047.

[62] Much has been written about the precise level at which surplus accounts should be deemed acceptable by state insurance regulators. Generally speaking, a "rule of thumb expounded for years" has been that "premiums written by a property-liability insurer should not exceed twice its policyholders surplus." R. MEHR & E. CAMMACK at 704. Although such a rule is too rigid if applied without "judgment and intelligent analysis," *id.,* it can be a useful regulatory tool to guard against insurer insolvencies if used properly and in conjunction with other "early warning" audit ratios. *See* NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, USING THE EARLY WARNING SYSTEM; NAIC REGULATORY TESTS FOR PROPERTY AND LIABILITY INSURERS 1, 4-5 (1976).

If insureds were allowed to bring an action against an insurer under an antitrust theory of "boycott, coercion, or intimidation" whenever insurers are forced to reduce their volume of business because of the weakened condition of their surplus accounts, the insurer's flexibility to manage its financial condition and the commissioner's power to order a reduction in underwriting activities would be thwarted by the insurer's potential liability under federal antitrust laws. Since the reduction of an insurer's book of business — for whatever reason — involves a refusal to write certain types or classes of business, and since such refusals are based in whole or in part on information obtained from industry-wide collection efforts, a federal court could easily find that a voluntary or state "suggested" reduction of underwriting activity constituted , at a minimum, a sufficient basis to permit a "boycott" action to proceed under a "concerted refusal to deal" standard. The mere existence of a threat of antitrust liability would therefore exert a definite chilling effect on a commissioner's "suggestion" to an insurer to reduce its book of business. As a result, the commissioner would lose the practical "leverage" of a license revocation, suspension or nonrenewal to compel insurers to enhance their financial solvency.

Besides the threat of licensure revocation, insurance commissioners may utilize state rating laws as enforcement mechanisms for regulating insurance company solvency in the property-casualty field. Both "prior approval" and "open-competition" rating laws not only require that rates not be "excessive," but both types of laws also direct that rates be "adequate." In "prior-approval" states commissioners may specifically disapprove filed rates

which are judged to be "inadequate,"[63] while many commissioners in "open competition" states have the power to "reimpose prior approval filing requirements"[64] if competition proves to be "detrimental to the solvency of insurers."[65]

If this Court extends the definition of the "boycott" exception as Respondents request, the regulation of insurance company solvency through state rating laws will likewise conflict with federal antitrust actions. It is not difficult to imagine a situation where a commissioner's disapproval of a rate filing in a "prior approval" state or reimposition of rate filings in an "open competition" state where "inadequate" rates were suspected would lead to litigation and a possible federal court determination that the commissioner's decision resulted in a "boycott." In such cases the interest of the states and the insurance-consuming public in having solvent insurers would stand in direct conflict with litigants asserting their allegations pursuant to an expansive "boycott" exception.

C. The Doctrine of *Parker v. Brown* Provides Few Protections Against Federal Antitrust Law Interference With the Insurance Regulatory Process.

A basic, albeit erroneous, premise of the lower court decision is the assumption that an expansive interpretation of the boycott exception would not "hamstring" the state insurance regulators in their responsibilities. The court stated that "[t]he boycott provision *merely neu-*

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[63] MONITORING COMPETITION at 55.

[64] *Id.* at 407.

[65] N.Y. INS. LAW § 176(2)(c) (McKinney 1966). *See also* MONITORING COMPETITION at 407.

tralizes that Act, leaving intact the doctrine of *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), which today insulates state regulatory schemes outside the insurance context from antitrust liability." 555 F.2d at 8 (emphasis added). The lower court's predication of its decision on this assumption suffers from two fatal defects.

First, in effect, the lower court is saying that the boycott provision *repeals,* i.e., "neutralizes," the McCarran Act and that the state insurance regulatory system must stand or fall depending upon the application of pre-McCarran Act case doctrine. This interpretative approach clearly usurps congressional authority to enact legislation by suggesting that courts may "neutralize" congressional actions through judicial failure to implement statutory mandates.[66]

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[66] The combination of the lower court's predisposition in favor of "free competition" and "free market places," 555 F.2d at 9, and the dissent's suggestion that the court disagrees with the policies of the McCarran Act, 555 F.2d at 13, may explain the court's willingness to disregard the congressional enactment of the McCarran Act. Two points are worth noting in this context.

First, the manner in which state insurance regulation and the insurance industry are evolving reflects increasing reliance on competition as a prime insurance regulatory technique. In fact, strong arguments have been made that the enhancement of meaningful competition in the economic sense can be better fostered in the insurance industry under state insurance regulation than under federal antitrust laws. *See* MONITORING COMPETITION at 465-94, 538-61.

Second, national policy supporting state regulation of insurance predates national antitrust law. In *Paul v. Virginia,* 75 U.S. (8 Wall) 168 (1869), this Court held that "issuing a policy of insurance is not a transaction of commerce." *Id.* at 183. For 75 years this case was generally construed to mean that insurance was not interstate commerce and thus not subject to federal jurisdiction. Consequently, insurance regulation developed at the state level. In *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944), this Court overturned 75 years of legal precedent. Congress immediately enacted the McCarran Act in 1945 to assure the continued primacy of state insurance regulation. Thus, except for the brief hiatus between the *South-*

Second, the lower court rationale ignores the narrowly circumscribed scope of antitrust immunity afforded by the *Parker v. Brown* doctrine in light of more recent cases. That decision has been most often cited for the proposition that the Sherman Act "was intended to regulate private practices and not to prohibit a State from imposing a restraint as an act of government." *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 616 (1976) (Stewart, J., dissenting), *quoting Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). Since the original articulation of the *Parker v. Brown* doctrine this Court has had an opportunity to refine the scope of the state-action exemption noted therein. *E.g., Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). Such cases have eroded the scope of the *Parker v. Brown* doctrine by refusing to grant an exemption from federal antitrust liability where "the initiation and enforcement of the program under attack involved a mixture of private and public decisionmaking." *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 593 (1976).

This Court's recent restriction of the *Parker v. Brown* doctrine in *Cantor v. Detroit Edison Co.* is particularly noteworthy. In *Cantor*, this Court held that a state-approved utility tariff was not a sufficient basis for implying an exemption from federal antitrust laws where the tariff included an anticompetitive "lamp-exchange program" initiated by private utilities. 428 U.S. at 598. In refusing

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Eastern Underwriters decision and the McCarran Act, the primacy of state insurance regulation has been national policy for well over 100 years. The Sherman Act, by comparison, did not arrive on the scene until 1890.

to grant an exemption from federal antitrust laws it was emphasized that this Court

> has never sustained a claim that otherwise unlawful private conduct is exempt from the antitrust laws because it was permitted or required by state law. 428 U.S. at 600.

By refusing to grant an exemption from antitrust laws under the facts of the *Cantor* case the *Parker v. Brown* doctrine has been significantly reduced to situations where only *direct* state activity is in question.

The limited scope of the *Parker v. Brown* doctrine has a significant impact on the case now before this Court. Since most state insurance regulatory measures contemplate "a mixture of private and public decision-making" the lower court's reliance on *Parker v. Brown* is grossly misplaced. That doctrine offers state insurance regulation few, if any, safeguards against federal antitrust law interference if the major thrust of the McCarran Act is, in the words of the lower court, "merely neutralized" by extending the "boycott" exception to insurer-insured relationships. For example, it was noted earlier that state laws regulating property-casualty insurance rates follow nine different patterns or formats.[67] Only one category of these laws — representing two states[68] — involves direct state-made insurance rates. In virtually all other states "the initiation and enforcement" of property-casualty insurance rates is accomplished through "a mixture of private and public decision-making," i.e., insurer or rating bureau rate development and state insurance department

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[67] *See* note 17 *supra* and accompanying text.

[68] These two states are Massachusetts and Texas. *See* MONITORING COMPETITION at 45.

approval or acceptance of such rates. If reliance is placed on *Parker v. Brown* rather than upon the McCarran Act, "the mere fact that a state regulatory agency" had either approved an insurance rate or allowed a rate to be "implemented" until a revised rate was "filed and approved" would not be "a sufficient reason for conferring antitrust immunity" on private insurance company activity, *Cantor v. Detroit Edison Co.,* 428 U.S. at 602. Thus, virtually every insurance rate established pursuant to either a "prior approval" or "open competition" rating law, under the first circuit's rationale, would be a potential target for an insured's claim of "boycott, coercion, or intimidation."

Nor are state rating laws the only example of state insurance regulatory measures which would find no protections from the *Parker v. Brown* doctrine if the "boycott" exception to the McCarran Act is extended to insurer-insured relationships. It will be recalled that an important method of regulating insurance policy terms is to require the insurance commissioner's approval of all policy forms. Since policy forms must first be drafted by the insurance company before presentation to the insurance commissioner, state regulation of policy terms clearly includes "a mixture of private and public decision-making." If insureds are allowed to bring federal antitrust actions against insurers under a "boycott" theory whenever a policy exclusion or limitation appears to them to be a "concerted refusal to deal," the combination of the lower court's decision and the *Cantor v. Detroit Edison Co.* decision indicates that the commissioner's prior approval of the policy will not be sufficient state action to qualify for the *Parker v. Brown* exemption. The absence of this exemption places in great doubt the scope

of insurance commissioners' ultimate authority to review and approve insurance policy language.

In sum, the first circuit's broad definition of the "boycott" exemption cannot be supported by its assumption that state insurance regulation would not be "hamstrung" because of the protections afforded by the *Parker v. Brown* doctrine. Not only is this assumption erroneous as a matter of law, but if permitted to stand, would usurp congressional authority and inhibit state regulatory efforts to fashion protections for the entire insurance-consuming public. Certainly such a result is inconsistent with

> Congress' purpose . . . to give support to the existing and future state systems for regulating and taxing the business of insurance.

Prudential Insurance Co. v. Benjamin, 328 U.S. 408, 429 (1946).

II. A SUGGESTED STANDARD FOR DEFINING THE SCOPE OF THE "BOYCOTT" COERCION, OR "INTIMIDATION" EXCEPTION TO THE McCARRAN ACT.

The case now pending before this Court embodies the fundamental issue of defining the scope of the "boycott" exception to the McCarran Act. The resolution of the issue has been the subject of considerable disagreement among the lower courts. The weight of authority in the lower courts has construed the "boycott" exception to the McCarran Act narrowly to encompass only those "boycotts, coercions, or intimidations" directed against insurance companies and agents.[69] On the other hand, the First Circuit Court of Appeals in this case, as well

[69] Addrisi v. Equitable Life Assurance Soc'y, 503 F.2d 725 (9th Cir. 1974), *cert. denied,* 420 U.S. 929 (1975); Meicler v. Aetna Cas. &

as dicta in cases decided by the second,[70] third[71] and fourth[72] circuits, has broadly construed that exception to include relationships between policyholders and insurers. More recently, the Court of Appeals for the District of Columbia[73] urged a middle ground approach when it declined to adopt the narrow construction of the boycott exception but at the same time did not find sufficient guidance for the proposition that the McCarran Act exception encompasses all acts of "boycott, coercion, or intimidation." In other words, that court would construe the scope of the "boycott" exception not so broadly so as to emasculate the McCarran Act nor so narrowly as to deprive insureds of appropriate protection against boycotts.

The varying viewpoints reflected by the different lower court decisions vividly present to this Court the issue of the scope of the "boycott, coercion, or intimidation" exception to the McCarran Act. Since the precedent established in this case can have a fundamental impact on the viability of state insurance regulation, the NAIC

Sur. Co., 506 F.2d 732 (5th Cir. 1975); Mathis v. Automobile Club Inter-Ins. Exch., 410 F.Supp. 1037 (W.D. Mo. 1976); McIlhenny v. American Title Ins. Co., 418 F.Supp. 364 (E.D. Pa. 1976); Royal Drug Co. v. Group Life & Health Ins. Co., 415 F.Supp. 343 (W.D. Tex. 1976) *rev'd on other grounds,* — F.2d — (5th Cir. 1977); Seasongood v. K & K Ins. Agency, 414 F.Supp. 698 (E.D. Mo. 1976), *rev'd on other grounds,* 548 F.2d 729 (8th Cir. 1977); Frankford Hosp. v. Blue Cross, 417 F.Supp. 1104 (E.D. Pa. 1976); Transnational Ins. Co. v. Rosenlund, 261 F.Supp. 12 (D. Ore. 1966).

[70] *See* Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co., 326 F.2d 841 (2d Cir. 1963), *cert. denied,* 376 U.S. 952 (1964).

[71] *See* Travelers Ins. Co. v. Blue Cross, 481 F.2d 80 (3d Cir.), *cert. denied,* 414 U.S. 1093 (1973).

[72] *See* Ballard v. Blue Shield, 543 F.2d 1075 (4th Cir. 1976).

[73] *See* Proctor v. State Farm Mut. Auto. Ins. Co., 561 F.2d 262 (D.C. Cir. 1977).

suggests that the Court consider the following standard for defining the scope of the boycott exception:

> *The exception may extend to insurer-insured relationships but only in the limited situations in which the antitrust result would not intrude into an area of:*
>
> *(a) state insurance regulatory activity, or*
>
> *(b) state sanctioned or permitted insurer activity, provided that such sanctioned or permitted activity is consistent with a valid "insurance" regulatory purpose, as distinguished from being simply a device to permit industry avoidance of antitrust prohibitions.*

This proposed standard, of course, requires a rejection of the lower court's broad construction of the "boycott" exception to the McCarran Act. Because of the NAIC's limited role as *amicus curiae,* no effort will be made to develop fully the legal arguments supporting a rejection of the expansive definition propounded by the first circuit. Suffice it to say that the lower court's view of the "boycott" exception would: (1) result in conflict between federal antitrust regulation and state insurance regulation contrary to the basic policy of the McCarran Act,[74] (2) cause judicial usurpation of con-

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[74] The basic underlying purpose of the McCarran Act is quite clear. Congress declared that "the continued regulation . . . by the several States of the business of insurance is in the public interest. . . ." 15 U.S.C. § 1011 (1970). Shortly after its enactment, this Court said "[o]biviously Congress' purpose was broadly to give support to the existing and future states systems for regulating and taxing the business of insurance." Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429 (1946). This Court more recently reaffirmed this conclusion in *SEC v. National Securities, Inc.,* 393 U.S. 453, 459 (1969) when it said that the McCarran Act was an attempt "to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." To achieve this purpose, the McCarran Act, among other things, essentially precluded the application of the antitrust laws to the business of insurance.

gressional authority by attempting to "neutralize" that Act,[75] and (3) violate principles of statutory construction by failing to construe the McCarran Act in a manner which would harmonize that Act as a whole and reflect the public policies on which the Act is premised.[76]

The adoption of the lower court's approach works contrary to congressional intent under the McCarran Act. Its expansive definition of the scope of the boycott exception possesses the potential of encompassing virtually every Sherman Act conspiracy allegation relating to the price, availability and terms of insurance within the ambit of the boycott exception. *See* Judge Campbell's dissent, 555 F.2d at 14-15. For example, price fixing allegations can be couched in terms of a conspiracy to refuse to sell coverage except at a certain rate. (The Respondents seek, among other things, an injunction prohibiting Petitioners from denying them medical malpractice insurance coverage on an occurrence basis at reasonable rates, 555 F.2d at 3.) *This approach would enable policyholders to convert grievances concerning policy terms into antitrust claims and interject courts into the consumer protection role heretofore reserved to the states.*

Furthermore, not only does the lower court's expansive definition interject the federal courts into the area of insurance regulation, thereby inviting policyholders and potential policyholders to invoke a federal forum to redress alleged grievances whenever they are not fully satisfied with the regulatory approach (unhappiness with higher than desired rates approved by the state), but also the "potential for conflict between state regulation and federal antitrust policies is real and the decision has the effect of substantially undercutting § 1012(b) of the Act," 555 F.2d at 15. In short, if the lower court's expansive definition of the boycott exception is permitted to stand, the decision would "emasculate" state regulation under the McCarran Act. Such an expansive definition of the scope of the boycott exception is clearly contrary to the purpose of Congress and creates a vast potential for regulatory and antitrust conflict in an area which Congress clearly delegated primacy to the states.

[75] *See* note 66 *supra* and accompanying text.

[76] Despite the First Circuit Court of Appeals assertion that the language of the boycott exception is unambiguous and broad, other lower courts have come to a different conclusion. *See* note 69 *supra*. Furthermore, Judge Campbell in his dissent points out that:

> Significantly this language does not track the broad "contract, combination . . . or conspiracy" language of the Sherman Act which Congress reasonably might have chosen had the intent been,

In contrast to the erroneous broad construction of the lower court, the NAIC's proposed standard for the scope of the "boycott, coercion, or intimidation" exception to the McCarran Act provides a reconciliation, at least to some extent, between those courts and judges attempting

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> as my brothers state, to encompass in the exception virtually all activities in violation of the Sherman Act involving more than an individual monopolist.
>
> While the precise scope of the exception language may be less than crystal clear, given the statutory scheme, I have no difficulty understanding why two circuit courts and six district courts — every court except, now, ourselves — have held that the § 1013(b) exemption is to be read narrowly as describing boycotts, coercion or intimidation directed against other companies and agents rather than, broadly, as also encompassing the gamut of company-policyholder relations. 555 F.2d at 14.

Similarly, the court of appeals in the *Proctor* case "recognize[d] that the terms of the provisions are not self defining. . ." 561 F.2d at 274. Furthermore, the various courts' review of legislative history as to the scope of the boycott provision has produced no consensus. Thus, neither the language of the provision nor legislative history seem to be determinative in construing the boycott exception. However, various fundamental rules of statutory construction lead to the conclusion of rejecting the lower court's broad definition. First, the matter contained in a statute should be interpreted together and in a manner to harmonize with other sections of the Act and with the purpose of the legislation. 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 81 (4th ed., C. Sands ed. 1973). Second, a statutory section outlining the policy of the statute may be used to resolve doubtful statutory meaning. *Id.* at 403. Furthermore, this Court has said:

> The *policy* as well as the letter of the law *is a guide to decision.* Resort to the policy of a law may be had to . . . qualify its apparent absolutes. . . . The process of interpretation also misses its high function if a strict reading of law results on the *emasculation* or deletion of a provision which a less literal reading would preserve.

Markham v. Cabell, 326 U.S. 404, 409 (1945) (emphasis supplied).

The expansive interpretation of the boycott provision by the lower court in this case — that is, that any concerted refusal to deal falls within the exception regardless of state regulatory activity in the area — contravenes the basic purpose of the McCarran Act in that it sub-

to avoid the emasculation of the McCarran Act, those decisions which have difficulty finding statutory language or legislative intent which would entirely exclude insurer-insured reltionships from the exception, and the *Proctor* case which suggests a need to accommodate the purpose of the McCarran Act's exemption from the antitrust laws with the boycott exception to that exemption. But most importantly, the NAIC's proposed standard would avoid a fundamental undermining of the state insurance regulatory mechanism and the concomitant protection it affords to the insurance-buying public.

The NAIC believes that its limited, but not narrowest, construction of the "boycott, coercion, or intimidation" exception to the McCarran Act is supported by the public policies inherent in both the Sherman Act and the McCarran Act, is consistent with the congressional intent supporting both Acts, and follows accepted principles of statutory construction. For these reasons the NAIC urges this Court to give special consideration to its proposed standard as the best vehicle for judging future "boycott, coercion, or intimidation" claims under the McCarran Act.

If the NAIC's suggested standard is applied to the facts of the case now before this Court, it is evident that Respondents' antitrust claim must be dismissed. In the

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merges state insurance rgulation to antitrust law and "emasculates" the basic provision of the Act. As Judge Campbell concluded:

> More important to me, however, is the statutory scheme which suggests, in the positioning of the exception, and in the very fact that the exception is just that, that § 1013(b) should be construed in a manner complementary to, rather than subversive of, the major premises of the Act.

555 F.2d at 15. A narrower construction of the boycott exception is essential to harmonize the Act as a whole in the context of the fundamental congressional purpose in enacting the McCarran Act.

instant case, a class action was brought on behalf of a Rhode Island physician and patients against four insurers alleged to have refused to provide medical malpractice insurance in violation of the antitrust laws prohibiting a conspiracy in restraint of trade. However, the insurance industry in Rhode Island is subject to regulation pursuant to the comprehensive insurance code of that state, including anticompetitive and unfair trade practice provisions.[77] In addition, at about the time this suit was commenced, Rhode Island was affirmatively seeking a solution to the cost and availability problems associated with medical malpractice insurance. A Rhode Island Joint Underwriting Association has subsequently been established to provide malpractice insurance coverage to health care providers who are unable to obtain such coverage from the voluntary market.[78] Thus, this case clearly poses a situation in which state insurance regulation has affirmatively acted in areas of legitimate and fundamental insurance regulatory concern — the price and availability of insurance. Defining the scope of the boycott exception to permit this antitrust litigation to continue would conflict with state insurance regulatory activity and establish the federal courts as an alternative consumer protection agency. Under th NAIC standard discussed above, the boycott exception to the McCarran Act does not encompass this action and the lower court's decision to the contrary should be reversed.

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[77] R. I. GEN. LAWS ANN. § 27-29-4 (1969).

[78] *Id.* at § 42-14.1-1 (Supp. 1976).

SUMMARY OF ARGUMENT

In *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969) this Court declared that "the relationship between insurer and insured" lay at the "core of the 'business of insurance.'" Since Congress opted for a state-directed system of insurance regulation under the McCarran Act in 1945, states have continued their long-standing supervision of "the relationship between insurer and insured." A fundamental and essential aspect of regulating this relationship is the oversight of the risk assessment process. By reviewing the rating and underwriting procedures of risk assessment, state insurance commissioners not only carry out their McCarran Act responsibilities but satisfy numerous public policy objectives which are inherent in any system of insurance regulation.

If this Court extends permissible antitrust "boycott" actions to relationships between insurers and insureds on an expansive basis as proposed by the lower court, it will clearly create a conflict between two distinct legal systems — state insurance regulation and federal antitrust regulation. Both of these systems cannot be applied to "the relationship between insurer and insured" without disrupting the delicate balance between federal and state regulatory policies under the McCarran Act. Because the confrontation between federal antitrust policies and state insurance regulatory policies would be basic and conceptually irreconcilable, it would "hamstring" existing state regulatory efforts aimed at property-casualty insurance rates. insurance availability, policy form content and insurance company solvency.

Contrary to the view of the lower court, the NAIC does not find that the pre-McCarran Act *Parker v. Brown*

doctrine insulates state insurance regulatory schemes from an expanded "boycott, coercion, or intimidation" exception. This Court's recent limitations on the *Parker v. Brown* decision indicate that only direct state regulatory activities will qualify for a state-action exemption from federal antitrust laws. As a result, the NAIC urges this Court to adopt a standard for interpreting the "boycott, coercion, or intimidation" exception to the McCarran Act which preserves the primacy of state insurance regulation but does not foreclose antitrust claims which do not usurp this primacy.

CONCLUSION

The lower court's extension of the "boycott, coercion, or intimidation" exception to the McCarran Act to insurer-insured relationships would seriously impede existing state insurance regulatory efforts. Because the antitrust concept of a "boycott" is irreconcilable with fundamental principles of insurance theory, federal antitrust law and state insurance law cannot be made to apply to insurer-insured relationships without a direct confrontation between federal and state policies. If state insurance regulation in the areas of property-casualty ratemaking, insurance availability, policy form approval and insurance company solvency are made subservient to federal antitrust actions involving claims of alleged "boycotts" by insureds, such a result would not only be inconsistent

with the basic thrust of the McCarran Act, but would portend grave consequences for the interests of the insurance-consuming public as a whole. For this reason the NAIC urges this Court to reverse the lower court's decision as to the broad scope of the "boycott" exception to the McCarran Act in favor of a more narrow, but not narrowest, interpretation of that exception.

Respectfully submitted,

Jon S. Hanson
Counsel of Record

David J. Brummond
Counsel

NAIC Central Office
633 West Wisconsin Avenue
Suite 1015
Milwaukee, Wisconsin 53203
Telephone: (414) 271-4464

Attorneys for the Amicus Curiae

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IN THE

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OCTOBER TERM, 1977

No. 77-240

ST. PAUL FIRE & MARINE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

DAVID M. BARRY, *et al.*, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* OF THE AMERICAN INSURANCE ASSOCIATION, THE ALLIANCE OF AMERICAN INSURERS AND THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

RICHARD A. WHITING
LOREN KIEVE
MARK F. HORNING
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Amicus Curiae
The American Insurance Association

FRED W. BECK
20 North Wacker Drive
Chicago, Illinois 60606

Attorney for Amicus Curiae
The Alliance of American Insurers

PAUL C. BLUME
2600 River Road
Des Plaines, Illinois 60018

Attorney for Amicus Curiae
National Association of
Independent Insurers

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MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* OF THE AMERICAN INSURANCE ASSOCIATION, THE ALLIANCE OF AMERICAN INSURERS AND THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

The American Insurance Association ("AIA"), the Alliance of American Insurers ("Alliance") and the National Association of Independent Insurers ("NAII") move this Court for leave to file the attached brief *amici curiae* in this case.

The movants have previously filed, with the consent of all parties, a brief *amici curiae* in support of the petition for a writ of certiorari. The appropriate con-

sent on behalf of the petitioners to the filing of this brief has been given. The consent of counsel for the respondents was requested but refused.

The AIA is a voluntary trade association of approximately 145 stock insurance companies; the Alliance is a voluntary trade association of approximately 100 mutual insurance companies; and the NAII is a voluntary trade association of over 400 insurance companies.[1] Together, these companies write most of the property and casualty insurance written in the United States.[2] In 1975, the net premiums received by the member companies of the three associations exceeded $45 billion.

The issue in this case—the applicability of the antitrust exemption accorded by the McCarran-Ferguson Act to insurers when sued by those seeking insurance—is of major importance to the membership of the *amici curiae*. The Act expressly renders the Sherman Act inapplicable to those engaged in the "business of insurance" to the extent regulated by state law, except in cases of "boycott, coercion, and intimidation." Until the decision below, the "boycott exception" has been construed to apply only to concerted refusals to deal

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[1] The members of the AIA, the Alliance and the NAII are listed in Appendices A, B and C, respectively, to the previously filed brief *amici curiae* in support of the petition for a writ of certiorari.

[2] Property and casualty insurance protects individuals and commercial enterprises against loss or damage to the insured's property caused by fire, theft, collision and other perils, and against losses arising from the insured's legal liability for injuries to other persons or damage to the property of others. The major lines of property and casualty insurance include automobile liability and physical damage, homeowners' multiple peril, commercial fire, workers' compensation, products liability and medical malpractice liability.

by insurers or insurance agents designed to eliminate other insurers or agents from competition, or to coercively influence their trade practices. The Court of Appeals below, however, has expanded the exception to permit policyholders unable to obtain the insurance coverage they desire to seek treble damage and injunctive relief in the federal courts, even though a state fully regulates the relations between insurers and their insureds.

The effect of the decision below will be to embroil the member companies of the *amici curiae* in the defense of antitrust suits whenever a policyholder dissatisfied with the terms of coverage gains admittance to the federal courts by alleging a concerted denial of the coverage he wants. Contrary to the policy and purpose of the McCarran Act, the decision of the Court of Appeals will thus place AIA, Alliance and NAII member companies in the dilemma of complying with conflicting state regulatory and federal antitrust standards.

Of particular concern to the *amici curiae* is the impact of the decision below on the validity under the antitrust laws of the numerous joint arrangements in the property and casualty insurance industry for the spreading (or "pooling") of risks. These arrangements have been created or authorized by the states to provide insurance for risks too large or unpredictable to be insured by individual companies. One such risk is medical malpractice liability, the subject of this case. Acting upon a proposal of the *amici curiae*, thirty-seven states have now established insurance pools (called Joint Underwriting Associations) composed of property and liability insurers, including the member

companies of the *amici curiae,* to provide coverage to physicians and hospitals.

Under the rationale of the decision below, however, an insurance pool's failure to provide requested coverages to applicants for insurance will not only be characterized as a "boycott" for purposes of removing the McCarran Act exemption, but, indeed, as a "boycott" *per se* illegal under the Sherman Act. The holding below, moreover, would appear to permit *per se* challenges to the joint development by insurers of uniform risk classifications, standardization of policy coverages and the joint collection and analysis of loss data whenever such activities have resulted in rejection of unacceptable risks.

For these reasons, the AIA, the Alliance and the NAII respectfully request leave to file the accompanying brief *amici curiae* in support of a reversal of the decision below.

Respectfully submitted,

RICHARD A. WHITING
LOREN KIEVE
MARK F. HORNING
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Amicus Curiae
The American Insurance Association

FRED W. BECK
20 North Wacker Drive
Chicago, Illinois 60606

Attorney for Amicus Curiae
The Alliance of American Insurers

PAUL C. BLUME
2600 River Road
Des Plaines, Illinois 60018

Attorney for Amicus Curiae
National Association of
Independent Insurers

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BRIEF *AMICI CURIAE* OF THE AMERICAN INSURANCE ASSOCIATION, THE ALLIANCE OF AMERICAN INSURERS AND THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

OPINIONS BELOW

The opinion of the United States District Court for the District of Rhode Island is not reported. The majority and dissenting opinions of the Court of Appeals are reported at 555 F.2d 3.

INTEREST OF *AMICI CURIAE*

The interest of the American Insurance Association ("AIA"), the Alliance of American Insurers ("Alliance") and the National Association of Independent Insurers ("NAII") is set forth in the accompanying Motion for Leave to File Brief *Amici Curiae*.

QUESTION PRESENTED

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1013 (1970) ("McCarran Act") provides that the federal antitrust laws are not applicable to the "business of insurance" when regulated by state law, except in cases of "boycott, coercion, and intimidation." The question presented is whether the "boycott exception" extends to concerted refusals by insurers to provide policyholders with the insurance coverage they demand on terms they deem satisfactory, notwithstanding state regulation of the availability and scope of such coverage.

INTRODUCTION AND SUMMARY OF ARGUMENT

In a two-to-one decision, the Court of Appeals for the First Circuit held that the McCarran Act did not bar a federal antitrust class action suit by Rhode Island physicians who contended that their inability to obtain medical malpractice insurance on the terms and rates they desired was the result of an insurance company conspiracy. Despite Rhode Island's regulation of the availability and price of malpractice coverage, the majority below ruled that suit was permissible under the McCarran Act's "boycott exception" because of respondents' allegations characterizing the alleged conspiracy as a concerted refusal to deal.

The court in effect construed the term "boycott" to include agreements by insurers to fix the terms and coverage of insurance or to refrain from competing for each other's customers. The decision below thereby jeopardizes the existence of joint risk-sharing arrangements created by property and casualty insurers and regulated by the states for the purpose of providing insurance to high-risk consumers who might not otherwise be able to obtain coverage. Under the novel interpretation of "boycott" advanced by the court of appeals, participants in such joint endeavors which refuse to sell coverages requested by policyholders would be deprived of the antitrust exemption expressly conferred by Congress and subjected to the application of the *per se* test of illegality applied to group boycotts.

This result abrogates the intent of Congress that the "boycott exception" apply only to blacklisting and other exclusionary practices by insurers directed at other members of the industry. It is also contrary to the policy and purpose of the McCarran Act—federal deference to state regulation of the relationship between insurers and their policyholders. Insurers participating in pooling activities will now be placed in the untenable position of attempting to comply with state regulatory requirements while also meeting federal antitrust standards applied in suits brought by disgruntled policyholders.

To effectuate the intent of Congress that joint activities by insurers be immune from the antitrust laws when they directly relate to the relationship with insureds and are regulated by the states, the court of appeals' interpretation of the boycott exception should be rejected.

ARGUMENT

I. THE DECISION BELOW WILL JEOPARDIZE THE EXISTENCE OF STATE MANDATED OR REGULATED INSURANCE POOLS NECESSARY TO MAKE INSURANCE AVAILABLE TO HIGH-RISK CONSUMERS

The intent of the McCarran Act was to suspend the application of the federal antitrust laws in deference

to state regulation of the "relationship between insurer and insured," including the "type of policy which could be issued." *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969). This central purpose of the McCarran Act is subverted by the decision below, which (1) defines as a "boycott" any joint refusal to provide insurance on the terms demanded, and (2) thus permits policyholders to take their grievances to federal court despite state regulation of the substance of their complaints. The court of appeals' distorted construction of the boycott exception thus brings into question the validity under the antitrust laws of all forms of joint insurer activity designed to make insurance available in high risk markets.

A. Under State Direction Or Authorization, Insurers Have Acted Vigorously To Provide Insurance In High-Risk Markets, Including The Medical Malpractice Market

In contrast to the sale of other products or services, an insurer's profitability depends not only on the prices it charges or the quality of its products or services, but also on the nature of the customers it selects. The process of selection is called underwriting, a process through which the insurer classifies risks based on analysis of historical loss data and projected trends, and then decides which risks it can safely insure.[1] Certain

[1] There is no doubt that underwriting is the "business of insurance" within the meaning of the McCarran Act. In SEC v. National Securities, Inc., 393 U.S. 453, 460 (1969), this Court included within the "business of insurance" the "type of policy which could be issued," "its reliability," the "fixing of rates," the "selling . . . of policies" and "other activities of insurance companies [which] relate . . . closely to their status as reliable insurers . . . ." Underwriting is not only inseparable from the selling of insurance policies, the setting of rates and the determination of the coverages provided, but is also an important means of maintaining solvency and reliability through proper selection of risks.

risks will inevitably be considered undesirable to individual underwriters because the expected losses exceed permissible rates, are beyond the insurer's financial capacity or fail to meet the underwriter's standards. The medical malpractice insurance which is the subject of this case is an example of a "residual" or "involuntary" market—one in which many insureds cannot obtain insurance from individual companies because they are unacceptable risks.

Assured availability of insurance to consumers at a price which is not excessive or unfairly discriminatory is a major goal of state insurance regulation. One response of the states to problems of availability has been to require (or, in some cases, authorize) property and casualty insurers to participate in joint endeavors to provide insurance for risks—such as medical malpractice liability—which the voluntary market finds unacceptable. These shared market mechanisms are designed to distribute equitably among insurers the losses which are anticipated from risks which cannot be placed in the voluntary market. Two basic forms of joint ventures have been adopted to deal with residual market problems:

> *Joint Underwriting Associations:* The state establishes or authorizes a separate facility, composed of all insurers licensed to write the particular line. Business is written through the pool and all losses are shared by members of the pool. The facility can have its own staff and operate as a separate insurer or it can utilize one or more servicing carriers.
>
> *Reinsurance Pools:* Insurers are required or authorized to "take all comers," but may decide whether to retain the risk or cede it to a reinsur-

ance facility composed of all insurers licensed to write the particular line.[2]

The response of insurers and the states to the "crisis" in medical malpractice insurance and problems in other involuntary markets demonstrates the extensive use of these joint venture arrangements and the depth of state regulation of them.

1. Medical Malpractice Insurance

Medical malpractice insurance was the first liability line of insurance in which the states instituted a mandatory shared market mechanism and is still probably the most acute involuntary market problem.

The availability of medical malpractice insurance assumed crisis proportions in 1974, when the insurance carrier which had provided coverage for the members of the New York Medical Society for over twenty-four years indicated that it would not renew its coverage. The problem spread when insurers in other states began to withdraw from the market, or raised premiums to levels which physicians and hospitals contended they could not afford.

[2] A third method of underwriting involuntary market risks is the assigned risk plan, in which risks are assigned to individual insurers on the basis of the number of similar risks insured in the voluntary market. A fourth, little-used, method is the state fund, which may be subsidized by private insurers to cover deficits. As an example, Maryland replaced its automobile assigned risk plan in 1973 with a state fund which is restricted to business where there is evidence of cancellation from one insurer or rejection by two insurers.

The exponential rate of increase in premium levels[3] was directly attributable to drastic increases in the number of claims and the dollar amounts of malpractice settlements. This acceleration in the size and frequency of claims resulted from the interaction of several factors, principal among which are: (1) rapid inflation in the cost of health care services; (2) marked increases in the utilization of health care services resulting from expanded private and governmental health insurance (*e.g.,* Medicare and Medicaid); (3) the high risk of injury associated with more sophisticated and advanced medical procedures and technology; (4) changes in the traditional doctor-patient relationship reflecting the impersonal character of more organized and specialty-oriented health care delivery systems; (5) recent developments in negligence law relaxing the standards for recovery; (6) the effects of inflation on juries' awards; and (7) an increasingly litigious public whose only redress for medical injury is the health care providers' liability insurance.

Past patterns of claims experience were inadequate to predict these developments, a problem compounded by the abnormally long period of time between issu-

[3] From 1965 through 1974, medical malpractice insurance rates for physicians increased five-fold. By mid-1975, rate levels for physicians and surgeons professional liability insurance in some states were more than 100 percent higher than 1974 levels. ***The Problems of Insuring Medical Malpractice,*** All-Industry Medical Malpractice Insurance Committee, November 1975, at 2. The referenced publication summarizes a special study of 10,000 medical malpractice claim files conducted by the Insurance Services Office (ISO) on behalf of ***amici curiae*** AIA and the Alliance and reviewed by the All-Industry Committee on Medical Malpractice Insurance (hereinafter "All-Industry Study"). For the convenience of the Court, a copy of the summary of the All-Industry Study has been lodged with the Clerk.

ance of policies and reporting of claims. Under the traditional type of policy, written on an "occurrence" basis, the physician is insured for any claim that might arise at any time in the future as the result of an incident that occurred during the twelve months the policy is in force. Consequently, it may be years before all medical "injuries" occurring in the policy year become reported claims, a claims phenomenon frequently referred to as the "long tail" factor.[4]

The result has been that total losses have far outstripped premiums.[5] Insurers today have therefore gen-

[4] In its January 1973 report, the Medical Malpractice Commission established by the Secretary of Health, Education and Welfare found that on the average only half of all claims are closed within 18 months after the incident occurred and 10 percent still remain open after six and one-half years. A study by the California Insurance Department determined that only 38 percent of all claims are reported within two years of the beginning of the policy year, and that only 33 percent of the ultimate losses, in terms of dollars paid out, are paid within five years after the beginning of the policy year. Yet a third study by the Insurance Service Office (ISO) has found that 75 months after the beginning of the policy year, fewer than 70 percent of the total incurred losses are paid. *See All-Industry Study*, at 9. In short, a significant portion of claims are not reported until years after the policy year ends, and the claims presented later tend to be higher in terms of dollars than those reported more quickly.

[5] A study conducted by the California Joint Legislative Audit Committee concluded that malpractice insurers in California had undergone serious erosion in their financial condition in recent years, despite premium rates that were the highest in the nation. As a group, malpractice insurers were found to show an underwriting loss. *See Report of the Special Advisory Commission on Medical Malpractice of the State of New York*, January 1976, at 222. The All-Industry Study found that ten years after the close of policy year 1966, the total of losses and loss adjustment expenses on *known* incidents during that year exceeded premiums by $6.7 million, and that the ultimate settlement of all claims was still uncertain. *All-Industry Study*, at 5-7.

erally been unwilling to accept the tremendously high risk associated with this type of coverage.[6]

Some malpractice insurers, rather than withdrawing from the market, elected to sell only "claims-made" policies. "Claims-made" coverage applies only to claims actually submitted in the given policy year, regardless of when the alleged malpractice occurred. Although the total amount of payments is not likely to be reduced under a "claims-made" approach, the premium can be made more relevant to current conditions. However, the medical profession has been reluctant to accept these policies because of the physicians' desire for continued protection once their active practice has terminated.

New York was the first state to react to the increasing unavailability of malpractice coverage. Adopting a proposal offered by the *amici curiae*, its legislature enacted a law creating an involuntary Joint Underwriting Association (JUA) whose membership consisted of all liability insurers doing business in that state. N.Y. Insur. Law §§ 681-695 (McKinney Supp. 1977). The temporary JUA was to remain in existence until the formulation and implementation of a tort reform program.[7]

[6] While there was considerable competition among insurers in the 1960's to insure doctors, fewer than a dozen companies voluntarily provide a significant market for this coverage today. *All-Industry Study*, at 2. A Department of Justice study suggests that there are generally "few companies writing [medical malpractice insurance] in any area" because of the " 'long-tail' factor" and state rate regulation. *The Pricing and Marketing of Insurance*, Report of the U.S. Department of Justice to the Task Group on Antitrust Immunities, January 1977, at 283.

[7] New York also authorized the formation of a hospital mutual insurance company to provide what was essentially a self-insurance facility. N.Y. Insur. Law § 316(g) (McKinney Supp. 1977).

Following New York's example, thirty-seven states now have laws authorizing JUAs which become operative upon a finding by the state insurance commissioner that malpractice insurance is not available in the voluntary market.[8] In almost all of the JUAs, membership is compulsory for all property and casualty insurers. In sixteen states, JUAs have actually become operative. In addition, twelve states have authorized creation of medical mutual companies, often in conjunction with a JUA. In two states, workers' compensation funds were empowered to extend coverage for medical malpractice. Ten states have formed Patient Compensation Funds for the payment of judgments out of a special state fund when the judgment exceeds certain limits. Most states have imposed extensive reporting requirements on insurers to monitor the problems of availability and obtain information for legislative changes.[9]

Thus, in less than three years, over two-thirds of the states have affirmatively acted to assure the availability of malpractice insurance to physicians and hospitals, most often in the form of joint insurer underwriting.

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[8] As the Court of Appeals noted, Rhode Island was one of the states which formed a JUA to provide medical malpractice insurance. 555 F.2d at 5-6, n.2.

[9] In addition to expanded state regulatory activities in the insurance field, numerous states instituted reforms in tort law and other legal provisions pertaining to malpractice. Typical changes included statutory alteration of the standard of due care, shortening of statutes of limitation, elimination of the *ad damnum* clause in malpractice complaints, authorization of binding arbitration, limitations on liability in cases of informed consent, statutory limits on liability, limitations on attorneys' fees, and creation of peer review panels to investigate instances of malpractice and improve health care quality standards.

2. Other Lines of Insurance

The states have similarly mandated joint venture arrangements to deal with availability problems in most of the other major lines of property and casualty insurance.

a. *Automobile:* Beginning in the 1920's and 1930's, the states began enacting auomobile financial responsibility laws, requiring motorists involved in accidents to carry proof of financial responsibility for future accidents, and compulsory automobile insurance laws. As a result, motorists were required to purchase automobile liability insurance. Many of them represented unacceptable risks because of their driving records or other factors. Consequently, the states have enacted assigned risk plans almost coincidentally with the passage of financial responsibility or compulsory liability laws, and, by 1959, every state and the District of Columbia had such a plan.

Seven states later opted for alternative shared market mechanisms; three (Florida, Hawaii and Missouri) for mandatory joint underwriting associations, and four (Massachusetts, North Carolina, South Carolina and New Hampshire) for reinsurance facilities.

b. *Property:* The involuntary property insurance market is of more recent origin. For some time before 1967, inflation, urban decay and the growing incidence of crime in urban areas had restricted the availability of many forms of property insurance for dwellings and commercial structures. In 1967, following widespread rioting in urban areas, President Johnson appointed the National Advisory Commission on Civil Disorders. To deal specifically with the insurance problems of urban core residents and businessmen, the

Commission appointed the National Advisory Panel on Insurance in Riot-Affected Areas (the "Hughes Panel"). The report of the Hughes Panel [10] resulted in the enactment by Congress of the Urban Property Protection and Reinsurance Act of 1968, 12 U.S.C. § 1749bbb *et seq.* (1970). The Act's solution to the urban property insurance availability problem was to provide federal riot reinsurance. Reinsurance was conditioned on the existence of state Fair Access to Insurance Requirements ("FAIR") Plans "to make essential property insurance more readily available in, but not necessarily limited to, urban areas." 12 U.S.C. § 1749bbb-3(b). The plan "must be approved by, and administered under the supervision of, the State insurance authority, or be authorized or required by State law." *Id.* In recognition of the states' primary role in regulating insurance availability, federal measures were designed to support rather than supplant local efforts.

Twenty-six states and the District of Columbia now have FAIR Plans. Three are voluntary, while the others require all insurers to participate in Plan writings and losses as a condition of writing property insurance in the state. Most state enabling laws prescribe Plan coverages.[11]

c. *Workers' Compensation:* All states now have workers' compensation legislation requiring defined

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[10] *Meeting the Insurance Crisis of Our Cities,* National Advisory Panel on Insurance in Riot-Affected Areas, January 1968.

[11] Seven states, subject to recurrent hurricane damage, now have "Beach Plans" or "Windstorm Pools." In all but one of these states, insurer participation is required based upon its share of the voluntary market for lines available through the plan.

categories of employers to provide medical, disability and rehabilitation benefits to employees for occupational injuries or disease, usually without regard to the fault of the employer. In thirty-two states, legislatures have required or authorized private carriers to provide coverage through statutory assigned risk pools or voluntary pools.

d. *General Liability:* Ever broadening rules of liability constitute heavy financial hazards for many professionals, businesses and governmental entities. As with physicians and hospitals, insurance against liability hazards may be essential to these persons' ability to provide goods and services to the public.

In the area of product liability insurance, the doctrine of strict liability has become widely accepted by courts throughout the country, causing an escalation of claims and losses especially with regard to the machine tool, pharmaceutical and chemical industries. To meet complaints of unavailability, a special committee of *amicus curiae* AIA advocated the adoption of Market Availability Plans ("MAPs") in states where problems had developed. To date, MAPs are operational in eighteen states. The plans are voluntary, instituted by state insurance commissioners in cooperation with the industry. A typical MAP has an Underwriting Committee which develops detailed information on the risks of the insureds and endeavors to obtain coverage from companies which in their judgment are most likely to provide it for the risk in question.

The most recent developing problem area is that of liability insurance for governmental entities, especially municipalities. Erosion of the doctrine of sovereign immunity and voluntary waiver of such immunity have

resulted in problems of market availability, and in a few states MAP-type plans, participation in which is voluntary, have now been created.

Another emerging problem is that of lawyers' malpractice insurance. At least one state has enacted legislation creating a standby JUA for this type of coverage, similar to the JUAs in the medical malpractice area.

In sum, virtually every problem of the availability of property and liability insurance is being dealt with by the states with close insurer cooperation. While insurer participation in these shared market mechanisms usually is mandatory, the procedures for handling this business (such as rate-making, determination of policy forms and coverages and guidelines for cancellation or renewal) are not state-made in the sense of being established by the insurance commissioner. Rather, the procedures are developed by the companies, and are made effective after review and approval by the insurance commissioner.

B. State-Regulated Insurance Pools Have Also Been Formed To Insure Risks Of Unusually Large Magnitude

In addition to the pooling mechanisms created or authorized by the states to deal with involuntary market problems, the insurance industry is characterized by a variety of other risk-sharing arrangements which function, on a permanent or *ad hoc* basis, to provide insurance coverage for specific types of risks too large to be safely handled by individual insurers.

In the permanent pools, insurers share premiums and losses concerning one or more specified insurance coverages. Permanent pools are most often formed to provide underwriting capacity for categories of risks which a single company (even with reinsurance ar-

rangements) could not insure either because of statutory limitations [12] or because of an underwriting judgment that the exposure to possibly catastrophic losses is too great.[13] The pools underwrite policies covering such hazards as those relating to nuclear reactors,[14] ocean shipping, processing of negative films for motion pictures, railroad rolling stock, oil refineries, grain elevators and aviation. Permanent pools are generally managed by a full-time professional staff providing specialized services and expertise.

On a more frequent basis, insurers participate in *ad hoc* pooling arrangements. These voluntary joint ventures are formed for the purpose of underwriting a specific risk, often a large commercial risk, against fire and allied perils or other hazards. Reinsurance is one type of *ad hoc* pooling arrangement, differing from other types in that the contract is not between the insured and the insurance pool but rather between the primary insurers (the "ceding companies") and the reinsurers. In effect, the participants in each of these various *ad hoc* arrangements decide in concert whether to provide insurance and what coverages to afford.

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[12] Typically, states limit the size of any single insured risk to ten percent of a company's paid-up capital and surplus. *See, e.g.*, Conn. Gen. Stat. § 38-110 (1958); N.Y. Insur. Law § 47 (McKinney 1966).

[13] Another reason for the creation of voluntary pools is to provide specialized inspection, loss prevention or claims adjustment services that individual member companies could not economically provide on their own.

[14] Now pending before this Court are consolidated cases involving the constitutionality of the Price-Anderson Act, 42 U.S.C. § 2210 (1970), which limits the total liability arising from nuclear reactor accidents. Duke Power Co. v. Carolina Environmental Study Group, No. 77-262, and Nuclear Regulatory Comm'n v. Carolina Environmental Study Group, No. 77-375, *prob. juris. noted*, November 7, 1977.

Almost all voluntary pooling arrangements, whether permanent or *ad hoc,* are regulated by the states through licensing or other authorization for joint underwriting, review of rules for admission to membership, requirements for the filing of annual and periodic reports and state inspection. As are all property and casualty insurers, the pools are subject to state unfair trade practices acts.[15]

C. The Decision Below Will Permit Insurance Pools To Be Challenged As *Per Se* Unlawful Group Boycotts Despite State Regulatory Oversight

By the very nature of the pooling mechanism, insurers must jointly decide on both the selection of the risks to be insured and the amounts or types of coverages to be provided. A pool's decision not to accede to a prospective insured's request for coverage, or its decision to cancel or not to renew a policy, would thus be indistinguishable from the alleged conduct of petitioners characterized by the court below as a "concerted refusal to deal" and hence a "boycott" necessitating removal of the McCarran Act exemption. The court's misconception of the term "boycott," however, would not be limited to application of the McCarran Act's boycott proviso, but would be extended to subse-

[15] In response to the McCarran Act, all fifty states and the District of Columbia have enacted such legislation, usually patterned on the model Unfair Trade Practices Act approved by the National Association of Insurance Commissioners in 1947 and revised in 1971. *Proceedings of the NAIC* 392, 413 (1947); 1 *Proceedings of the NAIC* 493 (1973). *See also* 1 Hanson, Dineen and Johnson, *Monitoring Competition: A Means Of Regulating The Property and Liability Insurance Business,* at 221 (1974). State insurance commissioners are empowered to issue cease and desist orders directed at certain enumerated practices. They may also define other "unfair methods of competition" or "unfair or deceptive acts or practices" and investigate and proscribe such conduct.

quent application of Sherman Act standards. It is clear that the court's construction of the term was premised upon the view that "boycott" under the McCarran Act and "boycott" under the antitrust laws were congruent terms both of which include any " 'concerted refusal to deal' with a disfavored purchaser" except upon the terms set by the agreeing parties. 555 F.2d at 7-8. Accordingly, conduct which is denominated a "boycott" for purposes of the McCarran Act would automatically be considered a "boycott" for purposes of the Sherman Act. The inevitable logic of the decision below is therefore that a pool's decision to refuse coverage is not only subject to the Sherman Act even though pool activities are regulated by the states, but is *per se* unlawful under the unvarying rule applied to group boycotts as announced in the decisions of this Court.[16]

The *per se* rule of illegality forecloses defenses based on affirmative economic justification or lack of unreasonable restraint on competition.[17] Consequently, pool

[16] *See, e.g.,* United States v. General Motors Corp., 384 U.S. 127 (1966); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). The *Klor's* case is cited by the court of appeals in support of its interpretation of "boycott" as used in the McCarran Act. 555 F.2d at 7.

[17] In Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. at 211, group boycotts were characterized as within that category of restraints on trade which by their " 'nature or character' were unduly restrictive." Examination of public injury, effect on prices or supply or reasonableness under the circumstances was thus irrelevant. *See also* United States v. General Motors, Inc., 384 U.S. at 146, where the *per se* rule was applied to prohibit inquiry "into the economic motivation underlying [the alleged refusal to deal]," and Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 467-68 (1941), where the Court upheld the Federal Trade Commission's refusal to receive evidence in support of the contention that a refusal to deal was necessary to combat allegedly tortious acts directed at the defendants.

members could not interpose in their defense the economic need for joint risk-sharing to safeguard against insolvencies arising from catastrophic losses or other unacceptable risks. Nor could pools be justified as increasing the availability of insurance in instances where individual companies did not have the capacity to absorb the potential liability. Likewise, pools could not be defended as procompetitive devices permitting participation in insurance placements by small or medium size insurers whose capacities would not be sufficient to enable them to compete on an individual footing. More importantly, pool members could not justify the rejection of individual risks as too hazardous, or because of insufficient pool capacity, or for any of a multitude of other sound business reasons for declining to provide coverage.

There is considerable potential for such harsh application of the *per se* rules to pools and other risk-sharing ararngements. While it is widely accepted in theory that higher risks should generally be charged higher premiums, where basic insurance coverages are required by state law or otherwise felt to be a necessity, state regulators have not permitted rates sufficient to cover losses. Unless adequate rates are secured, the only alternative for insurers is to restrict the lines of business they will write. If the decision below stands, however, withdrawal from a market may result in antitrust class actions based on boycott theories, exactly the course of action taken by respondents.

It is also not difficult to conceive of "boycott" suits being brought by, for example, an extra-hazardous commercial concern (*e.g.,* an oil refinery) or a potentially catastrophic risk (*e.g.,* a nuclear reactor) upon a pool's refusal to provide coverage because of a dispute over

inadequate safety measures. In the field of automobile insurance, many insurers have subsidiaries or affiliates which sell only to "substandard risks," drivers with bad records who are unable to obtain adequate coverage at the rates approved for better risks. If the preferred risk insurer refuses to insure except through the high risk affiliate, it could be considered a boycott by separately incorporated companies or a "coercive" allocation of customers.[18] The entire business of reinsurance will be placed in jeopardy if prospective policyholders are permitted to sue prime insurers which have refused coverage because of their inability to obtain reinsurance.

Another effect of the court of appeals' decision will be to deprive insurer pools of their ability to adjust the cost of their products in response to market forces. Every limitation of coverage, every exclusion from coverage and, indeed, the risk selectivity of underwriting is aimed at keeping the cost of insurance within the reach of the public. To subject insurance cost-cutting techniques permitted by the states to boycott actions will seriously retard the efforts of insurers to hold costs down.

More significantly, the decision below will adversely affect insurer solvency. It will result in forcing insurers to provide coverage to high risks while simultaneously denying full utilization of the joint mechanisms necessary to disperse losses and prevent insolvency.

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[18] In Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951), common ownership of separate corporations did not bar a finding of unlawful agreement under the Sherman Act. *See also* United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947), where the Court declared that "the corporate interrelationships of the conspirators . . . are not determinative of the applicability of the Sherman Act."

In sum, the blanket application of the court of appeals' definition of "boycott" could substantially deter continued state-regulated cooperation among insurers to provide insurance to those whose needs could not otherwise be met.

D. Joint Pooling Of Loss Experience, Uniform Systems For Risk Classification And Use Of Standardized Coverages Will Become Vulnerable to Antitrust Attack

The boycott standard originated by the Court of Appeals may also result in the application of the *per se* illegality rule whenever unacceptable risks are denied insurance on the basis of uniform risk classifications. The disruptive impact of the application of a strict liability rule to a function central to the rate-making process is an unintended but very real implication of the decision.

Both the selection of the risks which can safely or profitably be insured (the underwriting process) and the determination of an appropriate price (the rate-making process) depend on accurate assessment of risks. For the major lines of property and casualty insurance, risk assessment involves a projection of expected losses based on the experience of a class of individuals with similar risk characteristics. The degree of accuracy in projection depends primarily on the accumulation of a large pool of statistics relating to loss experience. Insurers have thus found it necessary jointly to collect and analyze their loss data.

In most states, this task is undertaken by licensed rating bureaus or statistical organizations—associations usually formed and managed by the insurer users

of the statistical data.[19] In analyzing historical data, the bureaus and statistical organizations use standard risk classifications, that is, defined classes of insureds which earlier data has shown to display similar risk characteristics. The uniform risk classifications are necessary to assure the reliability and comparability of reported data necessary for determination of rates; they also used in the individual underwriter's selection of the risks it judges acceptable. Virtually all states prohibit unfair discrimination in risk classification and many require prior approval of classifications or validation of the statistical data from which classes are defined.

Nevertheless, under the court of appeals' expansive reading of the "boycott" exception, a prospective policyholder, unable to obtain the coverage desired because a bureau or a statistical organization classified him as a substandard or unacceptable risk, could maintain an antitrust action alleging that the use of the classification constituted a concerted refusal to deal.[20] An "agreement" to boycott could be inferred from: (1) parallel refusals of insurers to furnish coverage

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[19] Some statistical organizations are, however, independently owned and operated. Except in a few "mandatory bureau" states, bureau membership (including participation in the bureau's statistical-gathering plan) is voluntary. Most jurisdictions nonetheless require insurers, whether or not bureau members, to report underwriting results either to the state or to a licensed statistical organization. Insurance pools for special risks (*e.g.*, the nuclear liability and aviation pools) will normally collect and analyze their own loss experience and classify the risks they insure.

[20] *Cf.* Meicler v. Aetna Casualty and Surety Co., 506 F.2d 732 (5th Cir. 1975), where the plaintiff alleged that use of a driver risk classification plan and corresponding rate schedule based on driving records was a "boycott" implemented to enforce "fixed" rates.

for a particular class of unacceptable risks, coupled with (2) knowledge that other insurers had decided similarly and either (3) common membership in the rate bureau or statistical organization which had developed the risk classifications or (4) common use of the classification.[21] An "agreement" could be inferred

[21] While conscious parallel behavior alone is insufficient circumstantial evidence from which a jury would be permitted to infer agreement, Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 541 (1954), the addition of some element of explicitly joint or interdependent behavior—such as bureau membership or use of uniform risk classifications in reporting loss data—may enable the question of agreement to reach the jury. *Cf.* Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700 (1969), where the Court summarily reversed summary judgment in favor of defendants because uniform product and practice standards were sufficient evidence from which conspiracy could have been inferred. Alternatively, the circulation by a bureau to its members of risk classifications bearing upon *future* selection of insureds could be viewed as the necessary additional evidence of joint rather than independent behavior. In Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914), for example, a retailers' association circulated to its members lists of wholesale dealers who sold at retail. Because the circulation of condemnatory lists had an inherently coercive effect, the Court saw this as simply an attempt to encourage retail dealers to boycott the offending wholesalers. The courts have also prohibited trade associations from circulating "suggested" price lists because of their potential for concerted use in pricing decisions even though there is no express agreement to adhere to the prices. *See, e.g.,* American Column and Lumber Co. v. United States, 257 U.S. 377 (1921); Northern California Pharmaceutical Ass'n v. United States, 306 F.2d 379 (9th Cir.), *cert. denied,* 371 U.S. 862 (1962); Plymouth Dealers Ass'n of Northern California v. United States, 279 F.2d 128 (9th Cir. 1960); United States v. Nationwide Trailer Rental System, Inc., 156 F. Supp. 800 (D. Kan.), *aff'd per curiam,* 355 U.S. 10 (1957). Based on this line of cases, the Department of Justice has concluded that, in the absence of the McCarran Act, the circulation of advisory rates by a bureau would violate § 1 of the Sherman Act even where the bureau's staff had been delegated

even where classifications are established by an independent statistical organization (rather than a bureau) if the classifications are based on data-gathering plans implemented with the assistance of insurers. Indeed, the Department of Justice is of the opinion that, without McCarren Act immunity, "[c]ooperation among the purchasers of trended loss information, such as assisting the [statistical] oranization in the development of a statistical plan, could be construed as sufficient to constitute a combination within the meaning of Section 1 [of the Sherman Act]." *The Pricing and Marketing of Insurance, supra,* at 177.

As a result, it will nearly always be a fact issue for the jury whether parallel refusals to provide coverage to unacceptable risks are a result of independent underwriting decisions or agreement among insurers. The risk of adverse jury determinations on the agreement issue and the consequent application of the *per se* rule will thus jeopardize continued use of uniform classifications even though approved by the states.

Rating or statistical organizations also prepare, with state authorization, standard policy forms and underwriting rules. For example, the Insurance Services Organization (ISO), a major rating and statistical organization, adopts standardized policy provisions relating to the limits, forms and scope of coverage. Like the use of standard risk classifications, standardization of coverages is necessary to facilitate the pooling of loss experience by enabling ready categorization of data. As with the use of uniform risk classifications, the use

authority to formulate rates " 'independent' of the membership." *The Pricing and Marketing of Insurance,* Report of the U.S. Department of Justice to the Task Group on Antitrust Immunities, January 1977, at 170.

of standard policy coverages (or underwriting rules), particularly by member insurers of the originating rate bureau, may be sufficient evidence upon which to base an inference of agreement. Upon a finding of agreement, the refusal to sell nonstandard coverages by insurers using uniform policy provisions would conceptually be no different from the ruling below that allegedly joint denial of "occurrence"-type coverage by insurers was a "boycott." Hence, even though regulated by the states, standardization of insurance policies may also be vulnerable to the *per se* rule.

E. The Doctrine Of *Parker v. Brown* Would Not Immunize Most Pooling Arrangements And Practices Regulated By The States

Recognizing that its decision will expose insurers to antitrust sanctions irrespective of state regulation, the Court of Appeals seems to suggest that joint refusals to provide coverage in the context of a "state-permitted structure or procedure" would be exempt under the "state action" doctrine of *Parker* v. *Brown,* 317 U.S. 341 (1943). The court's remarks ignore the fact that Congress in enacting the McCarran Act specifically rejected the approach of *Parker* v. *Brown* as insufficient to allow the states to regulate the business of insurance.[22] The court also considerably overstates the degree of protection which would be afforded in the absence of the Act.

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[22] The possibility that the *Parker* v. *Brown* exemption might protect state-regulated activities of insurers was mentioned by both the government and the Court in the decision precipitating the McCarran Act, United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 562 (1944); Brief of Appellant United States, at 96-97. Both the Senate and House of Representatives were aware of this possibility but recognized that not all state regulation of insurance would fall within the *Parker* exemption. *See* H.R. Rep. No. 873, 78th Cong., 1st Sess., at 7 (1943); S. Rep. No. 1112, 78th Cong., 2d Sess., at 2, 5-7 (1944). Congress instead chose to grant an express exemption contingent only upon the *existence* of a general scheme of state regulation, in whatever form chosen and irrespective of state compulsion within the meaning of *Parker* v. *Brown*. *See also* FTC v. National Casualty Co., 357 U.S. 560, 564-5 (1958); Ohio AFL-CIO v. Insurance Rating Board, 451 F.2d 1178, 1181-2 (6th Cir. 1971).

The decision of this Court in *Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (1976), indicates that immunity for private acts regulated by the states will not be conferred when the conduct results from privately initiated proposals approved by the state even though subsequent compliance with the approved proposals is required by law. 428 U.S. at 592-95. Under this standard, most state insurance regulation, because it consists of approval or review of privately initiated proposals on such matters as rates, coverages, risk classifications and policy forms, would not be sufficient for "state action" exemption purposes. In particular, none of the activities of state-authorized insurance pools, bureaus and statistical organizations in which membership is not required would be immune even though the state specifically regulates the organization's ground rules for joint underwriting, rate-making and admission to membership. Because pool membership is voluntary, all acts undertaken by members—including those required by the state—would be discretionary in the sense that they could have been foregone if the privately initiated membership decision had not been made or if a member were able to withdraw from the pool.

Even mandatory pool participation may not exempt underwriting practices of pool members not specifically originated and compelled by the state. Fo. example,

the decision by a mandatory joint underwriting association to sell medical malpractice policies on a "claims-made" basis rather than on an "occurrence" basis, even though approved by the state insurance commissioner, would not be exempted from the Sherman Act unless state legislation specifically compels issuance *only* of the "claims-made" form of coverage."[23]

This uncertainty about the effectiveness of the *Parker* v. *Brown* doctrine in subordinating the Sherman Act to the prevalent forms of state insurance regulation was one of the very reasons why Congress chose in the McCarren Act to suspend the federal antitrust laws contingent only upon the existence, not the form or content, of state insurance regulation.

II. REMOVAL OF THE ANTITRUST EXEMPTION FROM POLICYHOLDER SUITS WILL PLACE INSURERS IN THE DILEMMA OF COMPLYING WITH CONFLICTING STATE AND FEDERAL STANDARDS

Conceding that Rhode Island regulates the business of insurance (555 F.2d at 6), the court of appeals nonetheless concluded that the federal courts were open to policyholders who allege that an inability to obtain insurance coverage resulted from an insurance company boycott. Inherent in the decision, therefore, is the potential for insurers to be caught between conflicting state regulatory standards and federal antitrust standards. The dispute in this case over the availability and type of coverage well demonstrates the problems which the decision below will create for insurers:

[23] Rhode Island and twelve other states expressly permit or do not prohibit coverage on either basis.

1. *Rate-Making:* Insureds seeking to obtain coverage in antitrust actions will probably, as did respondents, request court-ordered issuance of policies at "reasonable rates" and/or treble damages based on such rates. Judicial determination of a "fair" rate may differ from the state's determination and thus collide with the requirement in the majority of states that insurers charge only approved or filed rates.

2. *Risk Classifications and Underwriting Standards:* All states which require approval of rates also require insurers to follow approved risk classifications in determining the premiums to be paid by individual insureds. Most states additionally prohibit discrimination in the rates charged to risks in the same classification. Insureds who successfully obtain judicial relief on the grounds they were denied coverage because they were in the "wrong" risk category will expose insurers to state administrative and other sanctions.

3. *Policy Form and Coverages:* Most states now set minimum standards for policy form and content, and delegate to state insurance commissioners the power to add other conditions. The standards are administered by requiring filing and approval prior to use, or, in some states, by filing subject to later disapproval. A few states prescribe policy forms.[24] Important aspects of state policy regulation include approval of proposed coverages, prescribed coverage requirements (as in the case of mandatory automobile liability insurance) or specified coverage limitations (as in the case of some JUA malpractice policies). Federal injunctive relief

[24] *Economic Regulation of Insurance in the United States*, U.S. Department of Transportation, Automobile Insurance and Compensation Study, at 12 (June 1970).

directing the availability of coverages may thus conflict with state restrictions on the amount or type of coverage.

4. *Solvency:* A prime function of insurance regulation is to preserve the reliability of the insurance mechanism through assuring insurer solvency. State solvency regulation includes prescribed limits on the risks an insurer can select, and capital, surplus and reserve requirements. To the extent the federal courts require otherwise unavailable coverages to be written, these standards may be breached.

The dilemmas exemplified above, with the resulting impairment of effective state regulation, were, of course, precisely the type of federal-state conflicts the McCarran Act was designed to avoid.

III. CONSISTENT WITH THE POLICY OF DEFERENCE TO STATE REGULATION OF THE INSURER-INSURED RELATIONSHIP, CONGRESS INTENDED THE TERM "BOYCOTT" TO APPLY ONLY TO REFUSALS TO DEAL AMONG COMPETING INSURERS OR AGENTS

The context and legislative history of the McCarran Act indicate that the Act's boycott exception was inserted because of Congress' concern over boycott practices internal to the insurance industry and having nothing to do with state regulation or the insurer-policyholder relationship.

In *United States* v. *South-Eastern Underwriters Association,* 322 U.S. 533 (1944), this Court held for the first time that the "business of insurance" was interstate commerce and that, by its terms, the Sherman Act was applicable to this business. Rejecting an argument that application of the Sherman Act would destroy state regulation of insurance, the Court concluded that "if exceptions are to be written into the [Sherman] Act, they must come from Congress, not this Court." 322 U.S. at 561.

Congress responded to the Court's invitation by enacting the McCarran Act. As the final substantive Committee Report on S. 340, 79th Cong., 1st Sess. (1945)—the bill which, with minor modifications, was ultimately enacted—stated,

> The purpose of the bill is twofold: (1) To declare that the continued regulation and taxation by the several States of the business of insurance is in the public interest; and (2) to assure a more adequate regulation of this business in the States by suspending the application of the Sherman and Clayton Acts for approximately two sessions of the State legislatures, so that the States and the Congress may consider legislation during that period. It should be noted that this bill, by the moratorium proposed therein, does not repeal the Sherman and Clayton Acts, *but opportunity will have been granted for the States to permit agreements and contracts by insurance companies which otherwise might be in violation of the Sherman and Clayton Acts. It should be noted further that no moratorium is granted from the Sherman Act relative to agreements or acts of boycott, coercion, or intimidation.* [H.R. Rep. No. 143, 79th Cong., 1st Sess., at 3 (1945) (emphasis added).]

There is, therefore, a seeming conflict between the "opportunity" granted for the states "to permit agreements and contracts by insurance companies which otherwise might be in violation" of the antitrust laws (H.R. Rep. No. 143, *supra,* at 3), and the proviso that the Sherman Act was to remain applicable to "boycott, coercion, and intimidation." A full reading of the

legislative history of the McCarran Act, however, provides persuasive indications that the boycott exception was indended by Congress to prohibit immunity only for the type of unregulated exclusionary agreements which were the focus of the *South-Eastern Underwriters* case.

The government charges in *South-Eastern Underwriters* were basically that the defendants had fixed the prices of fire insurance and agents' commissions through their rating bureau, and had engaged in a boycott of non-members of the bureau in order to effectuate the price-fixing scheme.[25] The boycott aspect of the

[25] The United States more specifically characterized the allegations as follows:

> Each count charges that the conspiracy consisted of agreements among appellees to sell insurance and to pay commissions to agents at rates fixed by the Association, and to withhold reinsurance facilities from, and prevent access to such facilities, by non-members of the Association (R. 11, 13). It is further charged that appellees have threatened to refuse and actually refused to deal with any agency which represents companies not members of the Association, have agreed to disparage and have disparaged the services and facilities of such companies, and have threatened to boycott and withhold patronage from persons purchasing fire insurance from such companies (R. 11, 13-14). It is averred that appellees have agreed to maintain and have maintained inspection and rating bureaus and local boards in order to police, strengthen and further the agreements and practices described (R. 11-12, 14). [Brief of Appellant United States, at 3-4.]

The government's allegation that the bureau had refused to sell to policyholders of non-members was mentioned in this Court's opinion, 322 U.S. at 535-36, and was cited by the court of appeals below as justifying its interpretation of the boycott exception. 555 F.2d at 11. Seen in the context of the government's other boycott allegations, however, it becomes clear that the refusal to deal with policyholders was actually directed at non-bureau companies and their agents, as were the other practices employed by the defendants. The government's allegation thus comports with the normal usage of the term boycott. Respondents have not similarly alleged that petitioners' conduct was directed at competing insurers.

case involved a network of highly restrictive rules which had been developed by insurance companies to cartelize the industry. These rules were directed exclusively at other members of the industry and were not regulated by the states. Chief among them were the reinsurance rule, that members of the rate bureau could not grant reinsurance to non-member companies, and the separation rule, that an agent of a member company could not represent a non-member company.[26]

As the court of appeals concedes (555 F.2d at 12), "the vice of insurance self-government outside the law" typified in *South-Eastern Underwriters* was the major concern of Congress in deciding upon the scope

[26] Other restrictive intra-industry rules prevalent prior to 1944 included: (1) the single counter rule, that a company could have only one agent in an area; (2) the limitation of agency rule, that a company could have only an agreed number of agents in an area; (3) the "in-or-out" rule, that a member agent could not represent a company unless all its local agents were members; (4) the territorial limitation rule, that certain agents could write business only in certain parts of a territory; (5) the non-deviation rule, that a member agent could not represent companies selling insurance at "cut-rates"; (6) the "mutual" rule, that a member agent could not represent non-stock companies; and (7) the "direct writer" rule, that a member agent could not represent companies that also sell insurance directly to the insured. Subsequent to *South-Eastern Underwriters*, rating bureaus and other insurer associations dropped these rules. Agents' associations, however, in some cases continued their use, resulting in a series of government civil actions in the late 1950's and early 1960's. *See* United States v. New Orleans Ins. Exch., 148 F. Supp. 915 (E.D. La.), *aff'd per curiam*, 355 U.S. 22 (1957); United States v. Insurance Board of Cleveland, 144 F. Supp. 685 (N.D. Ohio 1956), 188 F. Supp. 949 (N.D. Ohio 1960); United States v. Cincinnati Ins. Bd., 1963 CCH Trade Cas. ¶ 70,945 (S.D. Ohio 1963) (consent decree); United States v. Baton Rouge Ins. Exch., 1958 CCH Trade Cas. ¶ 69,068 (E.D. La. 1958) (consent decree).

of the antitrust immunity to be granted to the insurance industry.

Senator O'Mahoney, who was the principal interrogator throughout the hearings on the McCarran Act and one of three Senators on the conference committee which drafted the boycott exception, consistently expressed antagonism to the exclusionary practices of the insurance industry.[27] In the final Senate debates, he cited extensively, as he had earlier done in the hearings, from certain "rules and regulations" of the Insurance Executives Association, characterizing them as dictating:

> . . . who should and who should not engage in the insurance business, what commission an agent should receive or should not receive, who could have desk room in the office of the representative of an insurance company and how the business should be governed. . . . [91 Cong. Rec. 1485 (1945).]

He stated his view that the Association's rules and regulations were designed "*to coerce, intimidate, and boycott its own members* and compel them to obey the rules and regulations *the association itself prescribed*" and constituted an "agreement to coerce and intimidate *persons engaged in the insurance business.*" 91 Cong. Rec. 1486 (1945) (emphasis added).

Like Senator O'Mahoney's condemnation of the cartel-like rules imposed by insurer associations, the testimony before Congress which prompted the enactment of the boycott exception all dealt with claimed acts of boycott, coercion or intimidation by members of the in-

[27] *See, e.g.*, S. Rep. No. 1112, Part II ("Minority Views"), 78th Cong., 2nd Sess., at 2-3, 4-5 (1944).

surance industry directed against other members of the insurance industry. Attorney General Biddle, for example, condemned the coercive practices used to enforce bureau rates:

> The principal instruments utilized to compel adherence to private rate-fixing agreements are reinsurance and "separation." The former is used to coerce the companies directly, the latter to coerce their agents, and through them the companies themselves. Simply stated, "separation" is a type of discipline. It means that if an agent for one or more board companies undertakes the representation either of an independent stock company or of a mutual company, all the board companies acting together immediately withdraw their business from his office. [Joint Hearing on S. 1362, H.R. 3269 and H.R. 3270 Before the Subcommittees of the Committees on the Judiciary, 78th Cong., 1st Sess. (*"Joint Hearing"*), at 48 (1943-44).]

These, of course, were the very acts of "boycott, coercion and intimidation" alleged in the *South-Eastern Underwriters* indictment itself.

Senator O'Mahoney complained of the restrictive rules and regulations of the Interstate Insurance Board which required *members* to deal only with *members* in accepting reinsurance. *Joint Hearing,* at 310. An attorney for a group of insurance brokers in Chicago, Illinois testified as to his representation of his clients in a suit against the Chicago Board of Underwriters which contained similar allegations of restrictive practices by insurance industry members against other insurance industry members. *Joint Hearing,* at 366-90. Congressman Celler, who voted against the passage of the McCarren Act (91 Cong. Rec. 1094 (1945)), was concerned that § 3(b) of the Act contain language pro-

scribing any "agreement" to boycott, coerce or intimidate because he wanted to make sure that small insurance companies or agents would not be boycotted by others in the industry. 91 Cong. Rec. 1087-88 (1945).[28]

Senator O'Mahoney also emphasized that "private combinations and groups through private rules and regulations under which *persons engaged in the insurance industry* could be tried and convicted *for the violation of private law*" would "be absolutely outlawed" by the conference report's amendment of § 3(b) to proscribe "agreements" to boycott, intimidate or coerce. 91 Cong. Rec. 1483 (1945) (emphasis added); *see also* 91 Cong. Rec. 1485 (1945) (remarks of Senator O'Mahoney) (the conference report "outlaws completely" attempts by private groups to enforce "regulations for the insurance business.")

The Court of Appeals does not actually contest the view that the practices cited by Senator O'Mahoney and others were the reason for enactment of the boycott exception. Rather, essentially because of the abbreviated nature of the debates over the Act, it concludes that the exception was not "limited" to such intra-industry conduct and could thus also encompass conduct between insurers and their policyholders. 555 F.2d at 12. In adopting that construction, however, the

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[28] Senator O'Mahoney explained the effect and purpose of the "agreement" prohibition subsequently included in § 3(b) by the Conference Committee as follows:

> [A]ny attempt by a small group of insurance companies to enter into an agreement by which *they would penalize any person or any business which was attempting to do business in the insurance field in a way that was disapproved by them,* would be absolutely prohibited by this provision. [91 Cong. Rec. 1480 (1945) (emphasis added).]

Court has allowed the exception to swallow up the whole and render nugatory the fundamental purpose of the McCarren Act "to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 459 (1969).

CONCLUSION

In the form finally enacted, the McCarren Act was compromise legislation, in that it did not provide insurers voluntarily acting in concert with total immunity from the federal antitrust laws. The basic concept of the Act was that concerted action would be sanctioned only when regulated by the states. The judgment of Congress underlying this concept was that the states were better equipped than the federal government to regulate insurance because of their proximity to local problems and because of their existing experience and expertise in regulating the industry.[29]

The major problems in insurance regulation are those connected to the relationship between insurer and insured, including the availability of coverage, the extent and price of coverage and the handling of claims. These problems tend to depend on local conditions, most amenable to decentralized state regulation. They also involve the reconciliation of competing policies:

> Simultaneous realization of the goals of insurer solvency and market availability has presented a particularly difficult dilemma for regulators. Rate levels deemed reasonable from the public's view-

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[29] *See, e.g.*, 91 Cong. Rec. 1087 (1945); 90 Cong. Rec. 6532 (1944).

> point have not always been accepted as adequate to ensure continued willingness of insurers to participate widely in the market, particularly when loss experience fluctuates widely and unpredictably or trends upward. Consequently, regulators have often come to view their task as one of balancing basically conflicting objectives. [*Economic Regulation of Insurance in the United States,* U.S. Department of Transportation, Auto Insurance and Compensation Study, at 2 (June 1970).]

The varied and innovative responses of the states to the medical malpractice crisis are indicative of the flexibility of state regulation in resolving the interconnected problems of making insurance available at reasonable rates while also preserving the reliability and solvency of insurers.

It is difficult to envision federal courts doing as able a job of overseeing the underwriting process, evaluating the different mechanisms for availability and balancing the objectives of solvency and fair rates. Yet the unspoken premise of the court of appeals' decision is that federal courts are now to determine, through application of broad antitrust standards not specifically tailored to the business of insurance, whether a failure to provide policies or coverages for certain risks is justified. This is not a task for which the judiciary is suited, and is certainly not one Congress intended the courts to assume.

To prevent this judicial reallocation of responsibilities between the states and the federal government, specifically rejected by Congress in the McCarran Act, the decision below should be reversed.

Respectfully submitted,

RICHARD A. WHITING
LOREN KIEVE
MARK F. HORNING
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Amicus Curiae
The American Insurance Association

FRED W. BECK
20 North Wacker Drive
Chicago, Illinois 60606

Attorney for Amicus Curiae
The Alliance of American Insurers

PAUL C. BLUME
2600 River Road
Des Plaines, Illinois 60018

Attorney for Amicus Curiae
National Association of
Independent Insurers

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-240

ST. PAUL FIRE & MARINE INSURANCE CO., et al,

Petitioners,

v.

DAVID M. BARRY, et al,

Respondents.

BRIEF OF THE PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

ROGER TILBURY
1123 S. W. Yamhill Street
Portland, Oregon 97205
Telephone (503) 223-6291

HENRY KANE
220 Park Plaza West
10700 S. W. Beaverton Hy.
Beaverton, Oregon 97005
Telephone (503) 646-0566
Attorneys for Amicus Curiae

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 2-78

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

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Petitioners,

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DAVID M. BARR, M.D., et al.,

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BRIEF OF THE PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

—

By consent of the petitioners and the respondents the Portland Retail Druggists Association, Inc. files this brief as amicus curiae.

INTEREST OF THE AMICUS CURIAE

The Portland Retail Druggists Association, Inc. ("PRDA") is an Oregon nonprofit corporation composed of owners and operators of community pharmacies in the Portland area of Oregon and elsewhere in the United States.

The PRDA was the partially prevailing respondent in Abbott Laboratories v. Portland Retail Druggists Assn., Inc., 425 U.S. 1 (1976), which construed the 15 U.S.C. § 13c nonprofit institutions exemption to the Robinson-Patman Act, 15 U.S.C. §§ 13, et seq.

It seeks to represent the public interest in the practice of pharmacy.

This Court's decision in the case at bar will affect an antitrust case in which the PRDA is the plaintiff: Portland Retail Druggists Association, Inc. v. Kaiser Foundation Health Plan, Inc., et al., USDC CD Cal., Civil No.

77-1458-IH.

On January 23, 1978, said complaint was dismissed from the bench by the Hon. Irving Hill, U.S. District Judge, on the ground, among others, that the Kaiser defendants were exempt from the antitrust laws by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 ("the Act").

Judge Hill also dismissed on the same date the companion case of De Modena, etc., et al. v. Kaiser Foundation Health Plan, Inc., et al., USDC CD Cal., Civil No. 77-0005-IH.

The PRDA believes that the First Circuit decision before this Court is a correct statement of the law and that decisions to the contrary in other circuits are based on an erroneous and incomplete analysis of the Act and the legislative record.

The PRDA submits that if petitioners prevail, they and other insurance and

health care providers will have a license to boycott, coerce and intimidate to the injury of competition and the general public.

QUESTION PRESENTED

Is a regulated insurance company that engages in acts of boycott, coercion or intimidation subject to the federal antitrust laws, 15 U.S.C. §§ 1, et seq., pursuant to the 15 U.S.C. § 1013(b) exemption to the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015?

The subsidiary question is whether the 15 U.S.C. § 1013(b) exemption is limited to insurance company boycotts of their agents.

SUMMARY OF ARGUMENT

Statutory exemptions to the antitrust laws are to be strictly construed, and this rule applies to the McCarran-Ferguson Act.

The line of authority relied on by petitioners and industry amici originated with dictum in the first reported decision and was followed without independent analysis in later decisions cited by petitioners.

The weight of reason, authority and the legislative history is that the 15 U.S.C. § 1013(b) boycott exception to the McCarran-Ferguson Act is broader than a mere insurance company boycott of its agents, and includes the boycott complained of by respondents.

Petitioner's good motives or intent are not a defense to violation of the antitrust laws.

With exceptions, the McCarran-Ferguson Act exempts insurance companies from the federal antitrust laws.

15 U.S.C. § 1013(b) of the Act lists the exceptions:

> "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

The antitrust laws are to be construed liberally and exemptions from their application are to be construed strictly against the claimed exemption. Abbott Laboratories v. Portland Retail Druggists Assn., Inc., 425 U.S. 1, 11 (1976).

As an exemption from the application of the federal antitrust laws, the Act is to be construed strictly against any claimed immunity.

Various of the decisions relied upon by the petitioners (pet.br. 16-18) did not apply the strict construction rule.

Instead, often the reverse occurred.

The clear and unambiguous language of 15 U.S.C. § 1013(b) was construed to impotence, contrary to legislative intent.

The line of authority relied upon by petitioners originated with dictum in the first reported case to deal with the boycott issue: Transnational Insurance Co. v. Rosenlund, 261 F.Supp. 12, 27 (D.Ore. 1966):

> "Entirely aside from the legislative history of the Act, and assuming that the exception is applicable to the arena in which we are working, there is absolutely nothing in this record which would indicate a boycott, coercion or intimidation.***"

The court in Transnational had the benefit only of one out-of-context statement by Rep. Celler. The trial court file confirms that the court in Transnational was not cited to other parts of the legislative record.

Thus, on the basis of one statement during the congressional debates on the Act, and without reference to the whole legislative record, Transnational ignored the clear and unambiguous language of 15 U.S.C. § 1013(b).

Then courts in other cases cited by petitioners followed Transnational blindly and without independent analysis of the legislative history, assuming arguendo 15 U.S.C. § 1013(b) is ambiguous.

Transnational and the later cases that relied on Transnational should be rejected by this Court on the basis that there is no need to resort to legislative history when the statute is unambiguous, and if deemed ambiguous, 15 U.S.C. § 1013(b) is to be given its clear legislative intent: the McCarran-Ferguson Act does not protect boycott, coercion or intimidation.

The weight of reason and authority is that the 15 U.S.C. § 1013(b) exception is broader than a mere insurance company boycott of its agents.

Monarch Life Insurance Company v. Loyal Protective Life Insurance Company, 326 F2d 841, 846 (2d Cir. 1964), cert. denied, 376 U.S. 952 (1964), held that all insurance company boycotts or agreements to boycott condemned by the Sherman Act are subject to federal law, and a private treble-damage action is available to parties who are injured by such boycott or agreement to boycott.

Ballard v. Blue Shield of Southern West Virginia, Inc., 543 F2d 1075, 1078 (4th Cir. 1976) held that the McCarran-Ferguson Act does not exempt an alleged group boycott of chiropractors by regulated insurance companies.

The most recent decision appears to be Royal Drug Company, Inc. v. Group

Life and Health Ins. Co., 556 F2d 1375 (5th Cir. 1977 which, inter alia, rejected a narrow view of § 1013(b).

Because the Sherman Act is much more comprehensive than § 1013(b), affirming the First Circuit would not bring virtually every Sherman Act claim within § 1013(b).

The Sherman Act includes conspiracy, combination, attempt to monopolize and monopolization, none of which are listed in § 1013(b).

-

The National Association of Insurance Commissioners, the American Insurance Association, The Alliance of American Insurers, and the National Association of Independent Insurers have moved for leave to file briefs amici curiae.

The industry amici contend that the insurance industry acts in the public

interest and that affirmance of the First Circuit would be unfortunate.

Good motives or intent are not a defense to violation of the antitrust laws. United States v. Topco Associates, Inc., 405 U.S. 596, 610-611 (1972); Albrecht v. Herald Company, 390 U.S. 145, 154 (1964).

Royal Drug Company, Inc. v. Group Life and Health Ins. Co., supra, at 556 F2d 1386-1387 rejected the "justification" defense:

> " * * * Whether such economic coercion is proper is not for a court to decide. It is a matter of national policy which has been addressed by the Congress, from which any change will originate * * *. We apply the law as presently determined by the Congress and we hold that the antitrust laws are applicable to the arrangements challenged herein."

CONCLUSION

The First Circuit should be affirmed.

Respectfully submitted,

ROGER TILBURY
1123 S.W. Yamhill Street
Portland, Or. 97205

HENRY KANE
220 Park Plaza West
10700 S.W. Beaverton Hy.
Beaverton, Or. 97005

Attorneys for the Portland
Retail Druggists Association,
Inc., Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing BRIEF OF THE PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS on the counsel for petitioners, respondents and amici curiae by enclosing a copy thereof in an envelope, postage prepaid, and depositing the same in the United States mails at Portland, Oregon on February 10, 1978, addressed to those listed below, and further certify that all parties required to be served have been served:

Leonard Decof
Leonard Decof, Ltd.
111 Wayland Avenue
Providence, R.I. 02906

Sidney S. Rosdeitcher
Howard S. Veisz
Paul, Weiss, Rifkind,
Wharton & Garrison
345 Park Avenue
New York, N.Y. 10022

Charles Lister
Jonathan M. Weisgall
Covington & Burling
888 16th Street, N.W.
Washington, D.C. 20006

Joseph A. Kelly
Carroll, Kelly & Murphy
326 Industrial Bank Building
Providence, R.I. 02903

Walker B. Comegys
Powers & Hall
30 Federal Street
Boston, Mass. 02110

Kirk Hanson
Hanson, Curran & Parks
1210 Turks Head Building
Providence, R.I. 02903

Joseph V. Cavanagh
Higgins, Cavanagh & Cooney
600 Turks Head Building
Providence, R.I. 02903

Jon S. Hanson
David J. Brummond
NAIC Central Office
633 West Wisconsin Avenue
Suite 1015
Milwaukie, Wisc. 53203

Richard A. Whiting
Loren Kieve
Mark F. Horning
Steptoe & Johnson
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Fred W. Beck
20 North Wacker Drive
Chicago, Ill. 60606

Paul C. Blume
2600 River Road
Des Plaines, Ill. 60018

Henry Kane, of Attorneys
for Amicus Curiae

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-240

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, ET AL.,
Petitioners,

vs.

DAVID M. BARRY, M.D., ET AL.,
Respondents.

MOTION OF LAKESIDE HOSPITAL, INC., FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF LAKESIDE HOSPITAL, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

EUGENE GREENER, JR.
WILLIAM L. GIBBONS
Suite 1601, 100 North Main Building
Memphis, Tennessee 38103
Counsel for Lakeside Hospital, Inc.

E. L. MERIDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-8020

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In the Supreme Court of the United States

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ST. PAUL FIRE AND MARINE INSURANCE COMPANY, ET AL.,
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Respondents.

MOTION OF LAKESIDE HOSPITAL, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Lakeside Hospital, Inc. respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae.*

Lakeside Hospital, Inc. has an interest in this case in that it has pending presently in the United States District Court for the Western District of Tennessee, Western Division, a case in which the question involved is, in part, the same as that presented for decision in the instant case, namely the scope of the coercion, boycott, or intimidation exception to the McCarran-Ferguson Act's business of insurance exemption.

Lakeside Hospital, Inc.'s cause of action in the United States District Court for the Western District of Tennessee, Western Division, is against the Memphis, Tennessee, area Blue Cross/Blue Shield Plan and the national Blue Cross and Blue Shield associations. Many of the lower court decisions involving application of the McCarran-Ferguson Act's business of insurance exemption, and the boycott exception thereto, involve Blue Cross and Blue Shield plans across the country. Blue Cross and Blue Shield

control approximately one-half of the medical and hospital reimbursement market in the United States. Because of the protection and shelter Blue Cross and Blue Shield have sought through coverage under the McCarran-Ferguson Act, this Court's decision in the case presently before it could have far-reaching consequences to Lakeside Hospital, Inc. and other providers of services to Blue Cross and Blue Shield policyholders throughout the nation.

In addition, while the brief of the original plaintiffs, and present respondents, in the United States Court of Appeals for the First Circuit argues in favor of an interpretation of the boycott, coercion, or intimidation exception similar to the interpretation advocated by Lakeside Hospital, Inc., the discussion therein is inadequate to the extent that it does not cover the cause of action of which this movant is a party in the United States District Court for the Western District of Tennessee, Western Division, and the rulings thus far in that action. Lakeside Hospital, Inc. has no reason to believe that discussion of this particular cause of action will be substantially expanded in this Court by the respondents. The respondents do not object to the filing of a brief by this applicant as *amicus curiae*.

WHEREFORE, Lakeside Hospital, Inc. respectfully requests this Court to permit it to file the brief *amicus curiae* which is submitted herewith.

Respectfully submitted,

EUGENE GREENER, JR.

WILLIAM L. GIBBONS
Suite 1601, 100 North Main Building
Memphis, Tennessee 38103
Counsel for Lakeside Hospital, Inc.

February 10, 1978.

BRIEF AMICUS CURIAE FOR LAKESIDE HOSPITAL, INC. IN SUPPORT OF RESPONDENTS

I

QUESTION PRESENTED

While the McCarran-Ferguson Act expressly exempts the business of insurance from the Sherman Act to the extent it is regulated by the states, the McCarran-Ferguson Act also contains an express exception to that exemption for acts of boycott, coercion or intimidation.

In a 2 to 1 decision, the United States Court of Appeals for the First Circuit rejected the argument propounded by the original defendants and present petitioners that the boycott, coercion or intimidation exception should be applied only to blacklisting between or among insurance companies or their agents and held that the exception encompassed claims by policyholders based upon alleged conspiracies by insurance companies to limit available insurance coverage.

The Court is called upon to decide whether the boycott, coercion, or intimidation exception to the McCarran-Ferguson Act's business of insurance exemption applies only to acts of blacklisting or to a broader range of activities.

II

ARGUMENT

1. The Decision Below Is Consistent With Decisions of Other Courts of Appeals As Well As With Various District Court Decisions.

Various United States circuit courts as well as district courts have addressed the scope of the boycott, coercion,

or intimidation exception to the McCarran-Ferguson exemption.

Of the United States Courts of Appeals that have addressed the scope of this exception, most have indicated that it should not be applied narrowly, but rather should be taken at face value and applied broadly, as held by the United States Court of Appeals for the First Circuit in the case presently before this Court. In *Monarch Life Insurance Co.* v. *Loyal Protective Life Insurance Co.*, 326 F.2d 841 (2d Cir. 1963), *cert. denied* 376 U.S. 952 (1964), although the actions alleged by the plaintiff involved, in effect, blacklisting, the Second Circuit did not limit application of the exception to such actions and emphasized the all-inclusive language of the boycott, coercion or intimidation exception. Noting that it is axiomatic to interpret statutes whenever possible to effectuate their underlying purpose and intention, the Court declared:

> When the language of Section 3(b) is examined in the light of our understanding of Congressional purpose, we do not find ourselves driven to adopt an interpretation which flies in the face of the meaning intended by Congress. The statutory wording of § 3(b) provides that "[n]othing contained in this Act shall render . . . the Sherman Act inapplicable to any agreement to boycott. . . ." Under our interpretation, *all* (emphasis added) boycotts or agreements to boycott condemned by the Sherman Act are rendered subject to federal law. . . . [326 F.2d at 845-6.]

In *Dexter* v. *Equitable Life Assurance Society*, 527 F.2d 233 (2d Cir. 1975), while the Court held that the actions in question constituted the business of insurance for purposes of the McCarran-Ferguson Act's exemption, it also noted that it was not addressing the applicability of the boycott, coercion, or intimidation exception because

the plaintiff had not argued that the defendant's conduct included such acts.

In *Travelers Insurance Co.* v. *Blue Cross of Western Pennsylvania*, 481 F.2d 80 (3d Cir. 1973), *cert. denied* 414 U.S. 1093 (1973), the Third Circuit failed to find any boycott, coercion, or intimidation, but indicated that the exception covering these activities would have been applicable had any such activities been established by the plaintiff. As stated by the Court in *Travelers*:

> . . . Travelers asserts that Blue Cross used "coercion" to extract concessions from the hospitals. The district court held, and we agree with its conclusion, that the economic inducements which made the Blue Cross contract acceptable to hospitals did not amount to "coercion." [481 F.2d at 84.]

The clear implication from the court's statements is that if there had been boycott, coercion or intimidation, it would not have applied the McCarran-Ferguson exemption. More recently, in *Frankford Hospital* v. *Blue Cross of Greater Philadelphia*, 554 F.2d 1253 (3rd Cir., 1977), *cert. den.* No. 77-171 (U.S. October 3, 1977), in a *per curiam* decision, the Third Circuit indicated that the McCarran-Ferguson exemption for the business of insurance applied to Philadelphia Blue Cross *unless* the plaintiff was able to demonstrate the use of "boycott, coercion or intimidation" by Blue Cross.[1]

In *Ballard, et al.* v. *Blue Shield of Southern West Virginia, Inc., et al.*, 543 F.2d 1075 (4th Cir. 1976), *cert. de-*

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1. In its decision, the District Court noted that the exception should not be strictly limited to insurance company blacklisting but rather should be viewed as reaching other practices which have the same purpose and effect *or* which are equally pernicious in violating the concepts of competition and fair play. *See Frankford Hospital* v. *Blue Cross of Greater Philadelphia*, 417 F.Supp. 1104, 1110 (E.D. Pa. 1976).

nied 45 U.S.L.W. 3601 (March 8, 1977), the United States Court of Appeals for the Fourth Circuit also rejected the defendants' argument that the boycott, coercion, or intimidation exception should be applied narrowly. That case involved a lawsuit by West Virginia chiropractors against six corporations that sell Blue Cross/Blue Shield health insurance, the doctors who are the directors of the corporations, and the West Virginia Medical Association. The court held that the boycott, coercion, or intimidation exception to the McCarran-Ferguson exemption applied to such acts directed against the plaintiff chiropractors.

In *Battle* v. *Liberty National Life Ins. Co.*, 493 F.2d 39 (5th Cir. 1974), the United States Court of Appeals for the Fifth Circuit held that the boycott, coercion, or intimidation exception to the McCarran-Ferguson Act's business of insurance exemption would be applicable even though the alleged acts were not directed against another insurance company. The decision by the Fifth Circuit placed no implied limitations on the application of this exception. The court did not answer the question of whether the defendants had engaged in such acts, stating:

> The complaint specifically alleges that the defendants have engaged in such activities. . . . Liberty National, it is asserted in the Complaint, has threatened to cancel contracts of those who oppose its activities. . . . Without a hearing to establish the validity of such contentions, the District Court could not accurately determine the applicability of this limitation to this McCarran-Ferguson Act. [493 F.2d at 51.]

In addition to decisions by various United States Courts of Appeals, various United States District Courts have also indicated that the boycott, coercion or intimidation exception should apply to all such acts. *See Professional Adjusting Systems of America, Inc.* v. *General Adjustment Bureau, Inc.*, 64 F.R.D. 35 (S.D. N.Y. 1974); *Ackerman Shillingsworth* v. *Pacific Electric Contractors Ass'n*, 405 F.Supp. 99 (D. Hawaii 1976). As indicated by the Court in *United States* v. *Insurance Board of Cleveland*, 144 F.Supp. 684 (N.D. Ohio 1956), the boycott, coercion, or intimidation exception should not be interpreted narrowly. As stated by the court:

> By the terms of Section 1013(b), Congress made it clear that agreements to boycott, or acts of boycott affecting the insurance business remain at *all times* (emphasis added) within the effective ban of the Sherman Act. [144 F.Supp. at 690.]

Counsel for *amicus curiae* filed on behalf of Psychron, Inc., d/b/a Brunswick Hospital and Clinic, which is now Lakeside Hospital, Inc. and a subsidiary of Charter Medical Corporation, in the United States District Court for the Western District of Tennessee, Western Division, a complaint against Memphis Hospital Service and Surgical Association, Inc., d/b/a Blue Cross and Blue Shield Plan Insurance of Memphis, the Blue Cross Association, and the National Association of Blue Shield Plans, alleging violations of §§ 1 and 2 of the Sherman Act and seeking to recover threefold the damages suffered by Psychron, Inc. because of those violations by the defendants. *See Psychron, Inc.* v. *Memphis Hospital Service and Surgical Association, Inc., et al.*, No. C-75-52 (W.D. Tenn., filed February 4, 1975).

In its complaint, the plaintiff, Lakeside Hospital, Inc., claims that the defendant, Blue Cross and Blue Shield Plan Insurance of Memphis, is controlled by certain so-called non-profit hospitals (known as the Big Three) in the Memphis, Tennessee, area and that Blue Cross/Blue Shield has, through the actions of its Board of Directors, the members of which are all selected by the Big Three,

instituted and carried out a policy of reimbursement to hospitals which arbitrarily discriminates against for-profit hospitals,—such as that operated by Lakeside, Inc.—with the purpose and/or effect of injuring the restraining trade in the medical, clinical and hospital field.

The plaintiff in its complaint alleges that Blue Cross/Blue Shield has adopted a reimbursement policy which amounts to price fixing, under which the so-called non-profit hospitals are reimbursed their full billed charges for services rendered to Blue Cross/Blue Shield policyholders, while, at the same time, the charges of for-profit hospitals for services rendered to Blue Cross/Blue Shield policyholders are automatically and arbitrarily reduced before reimbursement is made. Blue Cross/Blue Shield controls thirty-five (35) to fifty (50) percent of the medical reimbursement market in the Memphis, Tennessee area.

The complaint alleges discrimination against for-profit hospitals in at least three ways. First, non-profit hospitals are paid their full charges, while for-profit hospitals are required to "negotiate" with Blue Cross/Blue Shield as to what the amount of reimbursement will be. Second, if the for-profit hospitals were perfect negotiators, the best they could get would be ninety (90) percent of their regular charges, but most such hospitals have been paid considerably less. Third, for-profit hospitals also must sign a "special contract" with many restrictive provisions (such as waiver of any right to collect any balance unpaid by Blue Cross/Blue Shield from the patient), while so-called non-profit hospitals signed no such contract and were paid in full their regular charges. (Both groups of hospitals do pay a three (3) percent administrative charge.)

In its complaint, the plaintiff also alleges that Blue Cross and Blue Shield Plan Insurance of Memphis have engaged in an unlawful combination and conspiracy with the so-called non-profit hospitals to restrain trade and to monopolize the market for medical, clinical, and hospital services and that activities pursuant thereto include acts of boycott, coercion, and intimidation against the plaintiff with the intent and purpose of destroying competition. Specifically, the plaintiff alleges that through the use of its dominance in the marketplace and its economic power, Blue Cross and Blue Shield Plan Insurance of Memphis attempted to coerce the plaintiff into accepting a permanent contract at discriminatory levels of reimbursement and that, because the plaintiff refused to submit to such coercion, said defendant actually cut off reimbursement to the plaintiff and refused to reimburse it for services provided to Blue Cross Plan members on any basis for a certain period of time. As another means of coercion and intimidation, the plaintiff alleges that Blue Cross and Blue Shield Plan Insurance of Memphis unjustifiably and wrongfully rejected certain claims and delayed an unreasonable length of time in paying certain other claims submitted to it by the plaintiff. In addition, the plaintiff alleges that it and certain other proprietary hospitals have been required to cost-justify charges and provide full medical records while the so-called non-profit hospitals have not been so required.

Also, affidavits have been filed with the Court indicating efforts by Blue Cross and Blue Shield Plan Insurance of Memphis to persuade Blue Cross policyholders to seek treatment and services in hospitals other than the plaintiff's hospital because said hospital "does not provide treatment and services covered by Blue Cross policies" or "is not an approved hospital." In effect, plaintiff has al-

leged that Blue Cross knowingly has attempted to persuade and divert patients from using the plaintiff's facilities by imposing an arbitrary and unfair burden on those who wish to use those facilities and by actively misleading potential patients as to the status of the hospital and the services rendered therein.

Soon after the complaint was filed, the Court issued a preliminary injunction (1) prohibiting the defendant from persuading or attempting to persuade or divert any group of individuals from using the plaintiff's hospital and (2) requiring the defendant to reimburse the plaintiff at a rate of at least ninety (90) percent of the average room rate of the so-called non-profit hospitals and at a rate equal to the highest rate charged by any of the non-profit hospitals for ancillary charges. The Court noted that the ninety (90) percent figure was of course temporary in nature and that final damages might very well include the difference between what the defendant is required to pay the plaintiff under the injunction and what the plaintiff should actually be paid under a policy of reimbursing all hospitals their full billed charges.

The defendant National Association of Blue Shield Plans filed a Motion for Summary Judgment on the basis that (1) the McCarran-Ferguson Act's business of insurance exemption was applicable and that (2) in the alternative, the boycott, coercion, or intimidation exception to that exemption was inapplicable. As is the case with the petitioners in the case presently before this Court, the National Association of Blue Shield Plans argued that the boycott, coercion, or intimidation exception applies only to actions of insurers and insurance agents against other insurers or insurance agents, in effect "blacklisting."

The United States District Court for the Western District of Tennessee, Western Division, refused to accept this limitation on the boycott, coercion, or intimidation exception advocated by the defendant National Association of Blue Shield Plans. In its Order of August 9, 1977, denying the defendant's Motion for Summary Judgment (App. A, infra, p. 22), the Court stated that a number of recent Court decisions reflect "the better rule and that the boycott, intimidation and coercion exception to the McCarran Act should not be limited to instances of blacklisting within the insurance industry." In particular, the Court cited the *Travelers*, *Ballard*, and *Battle* decisions, in addition to the decision presently under consideration by this Court, in support of a broad application of the boycott, coercion, or intimidation exception. The Court held that the plaintiff stated a colorable claim of boycott, coercion, or intimidation which it was entitled to develop at trial. Should this Court limit the application of the boycott exception to "blacklisting" between or among insurance companies or their agents, Lakeside Hospital, Inc. will not have the opportunity to prove acts of boycott, coercion, or intimidation at trial.[2]

In summary, Lakeside Hospital, Inc. submits that the clear trend of the law reflects that the boycott, coercion, or intimidation exception to the McCarran-Ferguson Act's exemption for the business of insurance should not be applied narrowly as advocated by the petitioners, but rather should be taken at face value and applied to *all* acts of boycott, coercion, or intimidation.

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2. In its action against Blue Cross/Blue Shield, Lakeside Hospital, Inc. contends also that the McCarran-Ferguson Act's business of insurance exemption is not even applicable to the activities of the defendants in question. The District Court has held that said exemption is applicable (App. A, infra, p. 19). However, the scope of the exemption itself is not the question presently before this Court.

2. The Decision Below Is Consistent With the Long-Standing Policy of Applying the Antitrust Laws Broadly and Exemptions to Them Narrowly.

In its denial of the defendant National Association of Blue Shield Plans' Motion for Summary Judgment, the District Court in *Psychron* also referred to the policy considerations involved in deciding the applicability of the boycott, coercion, or intimidation exception (App. A, infra, p. 22).

The United States Supreme Court's decision in *S.E.C.* v. *National Securities, Inc.*, 393 U.S. 453 (1969), is indicative of a long-standing general rule that exemptions to the antitrust laws should be interpreted narrowly and application of the antitrust laws should be interpreted broadly due to the remedial nature of those laws. As stated by the United States Supreme Court in *Peyton* v. *Rowe*, 391 U.S. 54, 65 (1968), it is a basic "canon of construction that remedial statutes should be liberally construed." This Court recently re-emphasized this general rule in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), stating:

> Congress intended to strike as broadly as it could in § 1 of the Sherman Act, and to read into it so wide an exemption as that urged on us would be at odds with that purpose.
>
> The language of § 1 of the Sherman Act, of course, contains no exception. 'Language more comprehensive is difficult to conceive.' *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533, 553 (1944). [421 U.S. at 789.]

In *Federal Maritime Commission* v. *Seatrain, Inc.*, 411 U.S. 726 (1973), the United States Supreme Court placed narrow limits on an exemption to the antitrust laws set forth in § 15 of the Shipping Act. In so holding, the Court

stated, "(A) broad reading . . . would conflict with our frequently expressed view that exemptions from antitrust laws are strictly construed."

The United States Supreme Court took this approach in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), as well, stating:

> When . . . relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws. [410 U.S. at 374.]

The broad application of the antitrust laws and narrow application of exemptions are also reflected in the leading United States Supreme Court case of *Allen Bradley Co.* v. *Local 3*, 325 U.S. 797 (1944). This landmark decision dealt with the exemption accorded labor unions from the antitrust laws, and the Court held that, while certain union activities are exempt from those laws, certain other union activities are not exempt, namely those which are not regarded as normal and usual activities. In that particular case, the Court held that union agreements with contractors and manufacturers that require contractors to deal only with those manufacturers who have closed shop agreements, and that bring about price and market control, are not exempt from the antitrust laws. As stated by the Court:

> There is, however, one line which we can draw with assurance that we follow the congressional purpose. We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union

participates, and such participation is a violation of the Act. [325 U.S. at 811.]

Consistent with this overall, long-standing policy, implied limitations should not be placed on application of the boycott, coercion, or intimidation exception to the McCarran-Ferguson Act's business of insurance exemption. It is well-established that limitations on the applicability of the antitrust laws should not be implied. *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975); *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 351 (1962). The reasonable interpretation and application of the boycott, coercion, or intimidation exception, as set forth by the First Circuit in its decision and by other United States circuit and district courts, as previously cited, is in keeeping with this need to apply the antitrust laws broadly, to interpret limitations on their application narrowly, and to avoid implied limitations on their applicability.

III

CONCLUSION

The First Circuit's decision is in keeping with recent decisions in a number of other circuits and district courts and, more importantly, reflects the long-standing policy of applying the antitrust laws broadly and avoiding implied limitations on those laws. The boycott, coercion, or intimidation exception to the McCarran-Ferguson Act's business of insurance exemption should be taken at face value and be deemed applicable to all such acts.

Respectfully submitted,

EUGENE GREENER, JR.
WILLIAM L. GIBBONS
Suite 1601, 100 North Main Building
Memphis, Tennessee 38103
Counsel for Lakeside Hospital, Inc.

APPENDIX

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

C-75-52

PSYCHRON, INC., d/b/a BRUNSWICH HOSPITAL AND CLINIC,
Plaintiff,

vs.

MEMPHIS HOSPITAL SERVICE AND SURGICAL ASSOCIATION, INC., d/b/a BLUE CROSS AND BLUE SHIELD PLAN OF MEMPHIS, THE BLUE CROSS ASSOCIATION OF BLUE SHIELD PLANS,
Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed August 9, 1977)

The defendants in this action have moved the Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The defendant National Association of Blue Shield Plans (NABSP) moves for summary judgment on the grounds that it lacks any involvement in the hospital reimbursement policies of Memphis Blue Cross, which, it asserts, is the only issue in this lawsuit. The defendant NABSP, joined by the defendant Memphis Blue Cross, moves for summary judgment alternatively on the grounds that the McCarran-Ferguson Act, 15 USC

§1011 et seq., which exempts state-regulated insurance businesses from the application of the antitrust laws, deprives this Court of jurisdiction over this cause.

As to both issues, it is asserted that there are no genuine issues as to any material fact and that the defendants are entitled to judgment as a matter of law. Upon consideration of defendants' Motion, the responses thereto and the applicable law, the Court is of the opinion that summary judgment cannot be granted upon any issue. The Motion is therefore denied.

I. LACK OF INVOLVEMENT FOR HOSPITAL REIMBURSEMENT

The first basis for the Motion of NABSP asserts that this action involves only the issue of the legality of the hospital reimbursement policy of defendant Memphis Blue Cross and that the defendant NABSP has no involvement in hospital reimbursement. NABSP asserts that this case necessarily involves a dispute only about hospital reimbursement and not physicians' reimbursement because under Tennessee law it is unlawful for a hospital to collect fees for physicians' services from a hospital and medical service corporation. TCA §56-3101. It is defendant's position, therefore, that plaintiff could not possibly have been injured by the Memphis Plan's physician reimbursement policy regardless of whether it is discriminatory. A well established principle of the antitrust laws holds that a plaintiff must plead and prove that the antitrust violations complained of proximately caused his injury. *Malamud* v. *Sinclair Oil Corp.*, 521 F.2d 1142, 1151 (6th Cir. 1975); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. den.*, 372 U.S. 907 (1963). Therefore, defendant asserts, plaintiff cannot base its antitrust claims on this ground.

With respect to plaintiff's allegation concerning hospital reimbursement, defendant asserts that the pleadings, discovery and affidavits filed in this cause conclusively show that NABSP is in no way involved in the hospital reimbursement policies of the defendant Memphis Blue Cross. The primary purpose of NABSP as an organization, defendant points out, is to promote the establishment and operation of plans of physician reimbursement. The affidavit of the president of NABSP has been submitted. It states that NABSP has no contact with local Plans, including the Memphis Blue Cross Plan, with respect to any aspect of hospital reimbursement and that NABSP does not prescribe, suggest, recommend, influence or discuss the amounts, terms, or methods of reimbursement for such services. An affidavit to the same effect has been filed by the president of Memphis Blue Cross. Furthermore, NABSP asserts, the allegations of plaintiff's Complaint and plaintiff's answers to defendant's interrogatories attack only the hospital reimbursement policies of Memphis Blue Cross, not its physician reimbursement policy. Finally, defendant notes, plaintiff's interrogatories and depositions of defendants' officials have failed to disclose any relationship between NABSP and the Memphis Plan with respect to hospital reimbursement.

NABSP's Motion for Summary Judgment cannot be granted because plaintiff in its Complaint also alleges discrimination with respect to physician reimbursement. Part XV of the original Complaint states:

> Further, Defendant Blue Cross now refuses on any basis to reimburse the Plaintiff's medical staff and doctors for the same or substantially similar services rendered to patients of the Plaintiff, although Blue Cross reimburses the medical staffs and doctors performing services of the Big Three. This conduct has

> created the imminent likelihood that Plaintiff will be immediately forced out of business because its medical staff will cease to function.

Therefore, plaintiff has alleged discrimination by the defendants in the reimbursement of physicians on plaintiff's staff. NABSP is much involved in the direction and control of physician reimbursement policy. Since physician reimbursement is an issue in this lawsuit at this time, defendant cannot be granted summary judgment on the basis of its lack of involvement in hospital reimbursement. The fact that Tennessee law precludes hospitals from collecting for physicians' services does not mean that plaintiff cannot be injured by defendant's physician reimbursement policies. A hospital is injured indirectly or secondarily if the members of its medical staff are discriminated against in reimbursements because they are members of the hospital staff. The injury becomes direct if the medical staff ceases to function due to a failure to be reimbursed for its services or to unreasonable delay in being reimbursed.

Although plaintiff also asserts that allegations in its Complaint that NABSP is a co-conspirator with Memphis Blue Cross with regard to discriminatory hospital reimbursement policies are sufficient grounds to overrule defendant's Motion this Court does not agree. The record in this cause fully supports defendant's contention that it has and has had no involvement in Memphis Blue Cross's hospital reimbursement policies. Plaintiff's claim that substantial discovery remains to be conducted in this case, particularly of NABSP officials, is not persuasive given the two and a half years this case has been pending. Affidavits submitted by counsel for the defendants also raise questions about plaintiff's intentions in this regard. However, because this Court is of the opinion that summary judgment should be used sparingly in antitrust cases and

only after ample opportunity for discovery [*S.J. Groves & Sons Co.* v. *Ohio Turnpike Commission*, 315 F.2d 235 (C.A. 6th 1963), *cert. denied*, 375 U.S. 824 (1963)], judgment on the issue of defendant NABSP's involvement in Memphis Blue Cross hospital reimbursement policy will not be granted at this time. Defendant NABSP may renew its Motion for Summary Judgment after an appropriate time. Defendant's Motion to certify this question for immediate appeal pursuant to 28 USC §1292(b) is denied.

II. THE McCARRAN-FERGUSON ACT EXEMPTION

The second ground of defendants' Motion asserts that the McCarran-Ferguson Act deprives this Court of jurisdiction. The McCarran-Ferguson Act exempts from antitrust scrutiny all disputes involving a matter which: 1) constitutes the business of insurance; 2) is regulated by state law; and 3) is not an agreement to boycott, coerce, or intimidate or an act of boycott, coercion, or intimidation. 15 USC §§1012(b), 1013(b). Defendants assert that these requirements are met in the present case. However, upon consideration of all the allegations of the Complaint, this Court finds that this action may involve an agreement to boycott, coerce, or intimidate, or acts of boycott, coercion, or intimidation. Accordingly, the McCarran-Ferguson exemption is not applicable to this case and defendants' Motion for Summary Judgment on this issue must be denied.

This Court is persuaded that matters relating to payments by Blue Cross plans, such as the Memphis Plan to hospitals for services rendered to the plan's subscribers, fall within the "business of insurance" within the meaning of §1012(b). *Travelers Insurance Company* v. *Blue Cross of Western Pennsylvania*, 481 F.2d 80 (C.A. 3rd 1973), *cert. denied*, 414 U.S. 1093 (1973); *Nankin Hospital* v.

Michigan Hospital Service, 361 F.Supp. 1199 (E.D. Mich. 1973). Although allegations exist in the Complaint that defendants' alleged conspiracy involves potential encroachment upon the business of rendering hospital services, this Court is of the opinion that these allegations are secondary to and only support plaintiff's main claim that defendants discriminated against plaintiff and other for-profit hospitals in its hospital reimbursement rates. *Compare Battle* v. *Liberty National Life Ins. Co.*, 493 F.2d 39, 39 (C.A. 5th 1974). The main dispute in this action relates to the business of insurance.

Similarly, the business is regulated by state law.

Plaintiff's allegations of a conspiracy to dominate prices and trade in the hospital business are sufficient, however, to invoke the boycott, coercion, or intimidation exception to the McCarran-Ferguson exemption. Plaintiff alleges that in 1971 defendants instituted a policy of differentiating in rates of reimbursement between not-for-profit and for-profit hospitals. Plaintiff asserts that for-profit hospitals like itself were required to "negotiate" with defendants as to the amount of this differential, although the best they could negotiate was to within ninety percent of the average of the not-for-profit hospitals and in fact none of the terms of the agreement could be changed, making the negotiations a sham. In addition, plaintiff contends that for-profit hospitals were forced to sign a special form waiving the right to collect over from patients any excess amount and were required to cost-justify their claims. Defendants were able to achieve these results, plaintiff states, because of the substantial economic power which Blue Cross holds in the Memphis area (Blue Cross controls thirty-five percent of all medical expense reimbursement in the Memphis area). In conjunction with this program, plaintiff charges that defendant engaged in

specific acts of intimidation and coercion. Plaintiff asserts that during the negotiations letters were sent by Blue Cross to plaintiff threatening to terminate plaintiff's relationship with Blue Cross if a permanent contract was not signed. Subsequently, plaintiff asserts Blue Cross did cancel its interim agreement with plaintiff. Plaintiff also asserts that pressure was exerted upon and by its medical staff for plaintiff to sign the agreement. Finally, plaintiff charges that defendants attempted to dissuade patients and other members of the public from using plaintiff's facilities. In this regard, a Preliminary Injunction prohibiting Memphis Blue Cross from persuading or attempting to persuade or divert any group or individual from using plaintiff's hospital was entered by this Court on February 26, 1976.

Where a Complaint specifically alleges that the defendants have engaged in acts of boycott, intimidation, and coercion, and sets out facts in support thereof, summary adjudication should normally not be attempted. *See Battle* v. *Liberty National Life Insurance Co.*, 493 F.2d 39, 51 (C.A. 5th 1974). This Court holds that plaintiff states a colorable claim of boycott, intimidation, or coercion which it is entitled to develop at trial.

The defendants assert that the boycott, intimidation, and coercion exception to the antitrust exemption has been applied only to discriminatory acts or conspiracies by insurance companies and insurance agents against other insurance companies or agents. A number of courts have so limited the boycott and intimidation exception. However, recently the Court of Appeals for the First Circuit has expressly rejected this limitation on the scope of the exception. *Barry* v. *St. Paul Fire and Marine Ins. Co.*, 1977-1 Trade Cases, 71,593 (1st Cir. 1977). Other Circuits also have applied the exception to the type of conduct

involved in this case, thus rejecting the limitation which defendants would place on its application. *Ballard* v. *Blue Shield of West Virginia, Inc.*, 543 F.2d 1075 (C.A. 4th 1976), *cert. denied*, 45 USLW 3598 (March 8, 1977); *Battle* v. *Liberty National Life Ins. Co.*, 493 F.2d 39 (C.A. 5th 1974). [*See also* the Third Circuit's opinion in *Travelers' Ins. Co.* v. *Blue Cross of Western Pennsylvania*, 481 F.2d 80 (C.A. 3rd 1973), *cert. denied*, 414 U.S. 1093 (1973), a non-blacklisting case in which the Court indicated that upon a proper showing of coercion the McCarran-Ferguson exemption would not have applied.]

In so holding, these Courts have followed the general rule that the antitrust laws should be applied broadly, and exemptions to the antitrust laws narrowly. *See generally Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 787 (1974); *Monarch Life Insurance* v. *Royal Protective Life Ins. Co.*, 326 F.2d 841 (C.A. 2nd 1963).

This Court believes that these decisions reflect the better rule and that the boycott, intimidation and coercion exception to the McCarran Act should not be limited to instances of blacklisting within the insurance industry. Accordingly, the McCarran-Ferguson Act does not deprive this Court of jurisdiction over this cause and this ground of defendants' Motion must be rejected.

For all of the foregoing reasons, IT IS THEREFORE ORDERED that defendants' Motion for Summary Judgment is hereby denied. However, defendant NABSP may renew its Motion of Summary Judgment on the issue of its lack of involvement in hospital reimbursement policy at an appropriate time following completion of discovery.

ENTER: This 9th day of August 1977.

/s/ Robert M. McRae, Jr.
Robert M. McRae, Jr., Judge
U.S. District Court